SUPREME COURT OF THE UNITED STATES.

No. 166.

DAVID L. YULEE, PLAINTIFF IN ERROR,

vs.

FRANCIS VOSE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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1 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 21st *rd* day of March, in the year of our Lord one thousand eight hundred and seventy-six, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

REMITTITUR, *March 22nd*, 1876.

2 FRANCIS VOSE, RESPONDENT,
ag'st
DAVID L. YULEE, APPELLANT.

Be it remembered that on the 20th day of May, in the year of our Lord one thousand eight hundred and seventy-five, David L. Yulee, the appellant in this action, came here into the court of appeals, by Dickerson & Beaman, his attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York.

And Francis Vose, the respondent in said action, afterwards appeared in said court of appeals by T. G. Strong, his attorney.

3 Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by M'r E. N. Dickerson, of counsel for the appellant, and M'r S. Hand, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

4 Therefore, it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

Court of appeals.

CLERK'S OFFICE, *Albany, March* 22, 1876.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

5 *Case and exceptions.*

COUNTY OF NEW YORK:

Supreme court.

FRANCIS VOSE
against
DAVID L. YULEE.

This action was commenced by the service of a summons on or about the 25th day of October, 1867. The complaint was served on or about the 15th day of February, 1868, and the answer thereto served on or about the 9th day of May, 1868.

The pleadings are contained in the judgment-roll hereinafter following.

They show, as parties defendant, the Florida Railroad Company, David L. Yulee, Edward N. Dickerson, Marshall O. Roberts, and Isaac K. Roberts. These defendants recovered judgment against the plaintiff at a special term of this court held on the 14th day of December, 1869. The plaintiff appealed to the general term, where the judgment of the special term was affirmed. The plaintiff then appealed to the court of appeals, and the judgment of the general term was affirmed as to all the defendants except David L. Yulee, and as to him the same was reversed, and a new trial granted.

The cause thereupon came on for trial at a circuit of this court
6 held in and for the county of New York before the Hon. George C. Barrett, justice, and a jury, on the 9th day of June, 1873, and a verdict was rendered for the plaintiff by direction of the court.

A jury was called and sworn, and Joseph H. Choate, esq., as counsel, opened the case for the plaintiff.

Edward N. Dickerson, esq., as counsel for the defendant, moved to dismiss the complaint for want of jurisdiction, on the ground that it was the duty of the court to proceed no further in the cause as against the defendant Yulee, because the defendant Yulee, under the act of Congress of July 27th, 1866, had, as was claimed, taken the proper steps and filed a proper petition, with affidavits, for the removal of this cause as against him into the next circuit court of the United States, to be held in the southern district of New York, and had, as was claimed, offered and filed a good and sufficient bond of surety, as required by such act, having also, as was claimed, made a proper motion for such removal, to which petition, bond, affidavits, and motion on file, and then before the court, M'r Dickerson called the attention of the court. Copies of this petition, bond, affidavits, and motion are hereto attached. (Appendices A and B.)

The court denied this motion.

Exceptions taken.

Defendant's counsel then moved to dismiss the complaint, on the ground that on the pleadings as before the court there is no cause of action which can be tried at the circuit before a judge and a jury, for the pleadings only call for a remedy by equity, and show no state of facts which furnish a remedy at law upon them.

The court denied this motion.

Exception taken.

7 Defendant's counsel then moved to adjourn the trial on account of the absence of the defendant Yulee, the principal witness for the defense.

Motion denied.

A. F. WALKER, called for the plaintiff, being duly sworn, testified as follows:

By Mr. Choate:

Have you computed the amount due at this date on the twenty-seven notes mentioned in the complaint, indorsed by the defendant Yulee, after crediting the two installments of interest and the proceeds of the bonds sold, which in the complaint are alleged and credited?

A. I have.

Q. Give the court the particulars.

A. The principal is	$116,693 00
Interest	51,896 58
Total	168,589 58

This result was arrived at as follows:

Principal of notes		$156,200 00
First credit	$6,825 00	
Interest then due (6 months)	6,226 26	598 74
		$155,601 26
Second credit	6,825 00	
Interest then due (6 months)	5,446 04	1,378 96
		$154,222 30
Next credit	87,942 76	
Interest then due (6 years 4 mos.)	69,271 12	18,671 64
		136,929 66
Proportion indorsed by Yulee		116,693 00
Interest to trial		51,896 58
		168,589 58

8 In reaching this result, the successive payments credited were first applied upon the interest due at the time of such payments respectively, and the balance in reduction of the principal amount due upon the notes indorsed by Yulee after crediting the sum realized at the sheriff's sale, was arrived at by simple proportion.

Plaintiff rests.

FRANCIS VOSE, called on behalf of the defendant, being duly sworn, testified:

By M'r Dickerson:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Before those 195 bonds were sold by the sheriff and bought by you did you give thirty days' notice to James T. Sutter, of New York, that that sale was about to be made?

(Objected to as immaterial. Objection overruled. Eexception taken.)
A. I gave no notice at all in regard to it to any one.
Q. Do you still hold those 195 bonds?
A. Yes, sir.
Q. Have you procured an injunction against the trustees of the Internal Improvement Company of Florida, restraining them from selling any of the eleven millions of acres of land, and ordering them to pay you first the face of those bonds out of those sales?
9 (Objected to as immaterial. Objection sustained. Exception taken.)

Cross-examination:

Q. Who was M'r Sutter, and what became of him last to your knowledge before the sale of these bonds?
A. He was in Europe, the best knowledge I could ascertain.
Q. Do you know when he went?
A. I do not know; in 1865, I think, or 1864.
Q. Do you know of his being here since?
A. He was here a short time since.
Q. Did he have any place of business here?
A. None that I know of.

Redirect:

Q. Did you search for Sutter in order to give him that notice?
A. I made inquiry for him.
Q. For the purpose of giving notice?
A. Not in regard to that notice, but for other purposes; I did not know whether he was here or not at that time.
Q. You did not attempt to give that notice?
A. I have already told you that.
M'r Choate: There was no pretense of giving notice.
Testimony closed.

Plaintiff's counsel asked the court to direct a verdict for the plaintiff.

By direction of the court, the jury rendered a verdict for the plaintiff for $168,589.58.
To which direction counsel for defendant excepted.

10 APPENDIX A.

New York supreme court.

FRANCIS VOSE
against
THE FLORIDA RAILROAD COMPANY, EDWARD N. Dickerson, David L. Yulee, and others.

GENTLEMEN: Please to take notice that on the calling of the above case on Monday next, or as soon thereafter as it may be called, and before the trial or final hearing of the same, I shall file a petition of David L. Yulee, one of the defendants herein, together with the accompanying affidavit of Edward N. Dickerson, esq., one of the defendants herein, for the removal of this cause as against him, the said Yulee, into the next circuit court of the United States, to be held in the southern district of New York, and shall then offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said pro-

cess against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there offering and entering special bail in the cause, if special bail was originally requisite therein, and thereupon shall ask the court to accept the surety and proceed no further in this cause as against the said defendant Yulee.

11 Please also to take notice that hereto annexed are copies of the petition, affidavit, and surety above referred to.

Dated New York, April 17, 1873.

Yours, respectfully,

WILLIAM C. TRAPHAGEN,
Attorney for Defendants, 7 Warren street, New York.

To Mess'rs STRONG & SHEPARD,
Attorneys for Plaintiff, 90 Broadway, New York.

STATE OF NEW YORK:

Supreme court.

FRANCIS VOSE
vs.
THE FLORIDA RAILROAD COMPANY, EDWARD N. DICKERSON, DAVID L. YULEE, and others.

To the honorable the supreme court of the State of New York, for the first judicial district:

The petition of David L. Yulee, of the State of Florida, respectfully shows that your petitioner is one of the defendants in this suit, and that the same was brought by Francis Vose, plaintiff, on or about the month of October, 1867, in the supreme court, to be held in the county of New York, in the said judicial district, and that the said plaintiff is and was at the time of bringing this suit a citizen of the State of

12 New York, and that your petitioner is and was at the time of bringing this suit a citizen of the State of Florida; and your petitioner further respectfully shows that the said plaintiff claims in this suit as against your petitioner a large sum of money, to wit, a sum exceeding one hundred thousand dollars, and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs. And your petitioner further respectfully represents that this suit is brought by the said plaintiff against the said defendant, demanding judgment against the said defendant for the amount of sundry promissory notes upon which this defendant is alleged to have been an endorser, and which were not paid by the maker. That the said suit is one in which there can be a final determination of the controversy so far as it concerns your petitioner without the presence of the other defendants as parties in the cause. And your petitioner further represents that this suit has not yet been determined, but that the same is pending for trial in the city and county of New York, and has not come to a final hearing, and that your petitioner desires to remove this suit before the trial or final hearing thereof into the next circuit court of the United States, to be held in the southern district of New York, in the second circuit, in pursuance of the provisions of law, as contained in the act of Congress approved July 27th, 1866, entitled "An act for the removal of causes in certain cases from the State courts," and that he is ready and willing to give such good and sufficient surety as the law directs for his doing all things and acts required to be done by the said

provision of law upon the removal of a suit into the United States court, and he offers herewith a bond executed by John H. Cheever and Charles L. Richards in the penal sum of two thousand dollars, conditioned that your petitioner shall enter into the circuit court of the United States, to be held in the southern district of New York, in the second circuit, on the first day of its session, copies of all processes, pleadings, depositions, testimony, and other proceedings in this suit affecting or concerning him, and doing such other appropriate acts as, by the said act of Congress approved July 27th, 1866, are re-
13 quired to be done upon the removal of a suit into the said United States court. And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States, to be held in the southern district of New York, in the second circuit, pursuant to the statutes of the United States in such case made and provided, and that no further proceeding may be had therein in this court as against him.

And your petitioner will ever pray, etc.

D. L. YULEE,
Petitioner.

STATE OF FLORIDA,
Nassau County, ss:

D. L. Yulee, being duly sworn, deposes and says that the contents of the petition above subscribed by him are true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

D. L. YULEE.

Subscribed and sworn this 10th day of April, 1873.

D. M. HAMMOND,
County Judge.

COUNTY OF NASSAU,
State of Florida:

I, clerk of said county, certify that D. M. Hammond, before whom the foregoing affidavit was made, is the county judge of said county, duly commissioned according to law, and that his signature above is genuine.

[L. S.] F. H. WHITNEY, *Clerk.*
Per L. BILLINGS, *Deputy.*

14 APPENDIX B.

Know all men by these presents that we, John H. Cheever and Charles L. Richards, are hereby held and firmly bound unto Francis Vose, his executors, administrators, and assigns, in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Francis Vose, his executors, administrators, or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators, and every of them forever, by these presents. Sealed with our seals this 16th day of April, in the year of our Lord, 1873.

I. Whereas the above-named Francis Vose has commenced an action in the supreme court of the State of New York against the Florida Railroad Company, Edward N. Dickerson, David L. Yulee, and others;

II. And whereas the said David L. Yulee, before the trial or final hearing of the cause in said action in said court, has filed his petition for the removal of the cause as against him into the circuit court of the United States, to be held in the southern district of New York, in the second circuit, in pursuance of the act of Congress approved July 27th, 1866:

Now, therefore, the condition of the above obligation is such that if the said David L. Yulee shall enter into said circuit court, on the first day of its session, copies of the process against him in said cause, and of all pleadings, depos ons, testimony, and other proceedings in said cause affecting or concerning him, and shall also then and there appear and enter special bail, if special bail in the case was originally requisite therein according to the law and practice of the United States and its courts, then these presents and obligations shall be void, or otherwise to remain in full force.

JOHN H. CHEEVER. [SEAL.]
CHARLES L. RICHARDS. [SEAL.]

15 *City and County of New York, ss:*

John H. Cheever, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and householder within this State, and is worth the sum of ten thousand dollars over and above all his liabilities, and exclusive of property by law exempt from execution.

JOHN H. CHEEVER.

Sworn and subscribed before me this 16th day of April, A. D. 1873.
[SEAL.] JOHN G. H. MEYERS,
Notary Public, New York County.

City and County of New York, ss:

Charles L. Richards, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and householder within this State, and is worth the sum of ten thousand dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution.

CHARLES L. RICHARDS.

Sworn and subscribed before me this 16th day of April, 1873.
JOHN G. H. MEYERS,
Notary Public, New York County.

City and County of New York, ss:

I certify that on this 16th day of April, 1873, John H. Cheever and Charles L. Richards, above named, to me personally known to be the persons described in, and who executed the above undertaking, personally appeared before me, and severally acknowledged that they executed the above undertaking as their own free act, for the uses and purposes therein mentioned.

[SEAL.]
JOHN G. H. MEYERS,
Notary Public, New York County.

16 New York supreme court.

FRANCIS VOSE,
vs.
THE FLORIDA RAILROAD COMPANY, EDWARD N. DICKERSON, DAVID L. YULEE et al.

City and County of New York, ss:

Edward N. Dickerson, being duly sworn, says: I am one of the defendants in the above entitled suit, and am personally well acquainted with the defendant Yulee, who has made the petition herein for the removal of the cause in said suit, so far as it concerns him, into the United States circuit court; and I have read the said petition and do know all the facts therein stated are true; and the said Yulee is and was at the time stated a citizen of the State of Florida, and now resides in said State. The matter in dispute in this case exceeds the sum of five hundred dollars, and the said cause is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties.

EDWARD N. DICKERSON.

Sworn and subscribed before me this 17th day of April, 1873.

JOHN G. H. MYERS,
Notary Public, New York County.

Edward N. Dickerson, being duly sworn, saith that the other defendants in the case are Edward N. Dickerson, Marshall O. Roberts, and Isaac K. Roberts, who are citizens of New York, and David L. Yulee is a citizen of Florida.

EDWARD N. DICKERSON.

Sworn and subscribed this 4th day of June, A. D. 1873.

RICHARD C. BEAMISH,
Notary Public, New York County.

17 Service of a copy of the within is hereby admitted.
Dated New York, April 1, 1873.

STRONG & SHEPARD,
Attorneys for Plaintiff.

(Endorsed:) Filed June 5, 1873.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original petition, bond, affidavit, and notice of motion on file in my office, and that the same are correct transcripts therefrom, and of the whole of such originals.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 25th day of September, 1873.

[SEAL.] CHARLES E. LOEW, *Clerk.*

18 *Judgment-roll.*

FRANCIS VOSE, PLAINTIFF,
against
THE FLORIDA RAILROAD COMPANY, DAVID L. Yulee, Edward N. Dickerson, Marshall O. Roberts, and Isaac K. Roberts, defendants.

Summons—For relief. Com. not ser.

To the defendants:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the supreme court of the city and county of New York, in the city hall, in the said city, and to serve a copy of your answer to the said complaint on the subscribers at their office at No. 62 Broadway, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated October 25th, 1867.

J. E. & J. D. BROOME,
Plaintiff's Attorneys.

19 CITY AND COUNTY OF NEW YORK:

Supreme court.

FRANCIS VOSE, PLAINTIFF,
against
THE FLORIDA RAILROAD COMPANY, DAVID L. Yulee, Edward N. Dickerson, Marshall O. Roberts, and Isaac K. Roberts, defendants.

Francis Vose, the plaintiff in this action, complains of the defendants, The Florida Railroad Company, David L. Yulee, Edward N. Dickerson, Marshall O. Roberts, Isaac K. Roberts, and their associates, whose names are at present unknown to the plaintiff, but who he prays may be made parties defendants hereto when discovered; and alleges—

That the defendants, The Florida Railroad Company, is and was at the several times hereinafter mentioned a corporation organized and acting under a charter from the general assembly of the State of Florida, approved on the third day of January, 1853. And that the said

20 Florida Railroad Company, as this plaintiff alleges upon information and belief, did on or about the day of March, 1865, notify the trustees of the internal improvement fund of the State of Florida of their full acceptance of the provisions of an act of the general assembly of the State of Florida, entitled "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6th, 1855, for so much of the lines of railroad authorized by section four of said act as lay between Amelia Island on the Atlantic and the waters of Tampa Bay in South Florida, with the extension to Cedar Key in East Florida, the work on so much of said lines as lay between Amelia Island and a proper point for the branching of the extension to Cedar Key, together with said extension, to be commenced immediately, and the line from said points to the water of Tampa Bay to be commenced as soon as chartered privilege therefor could be obtained. To which acts this plaintiff begs leave to refer. And this plaintiff further alleges that

by the first section of an act of the general assembly of the State of Florida, entitled "An act to amend the act incorporating the Florida Railroad Company," approved on the 14th day of December, 1855, it is enacted as follows:

"Be it enacted by the Senate and House of Representatives of the State of Florida, in general assembly convened, that the act incorporating the Florida Railroad Company, approved the 8th day of January, A. D. 1853, is hereby amended so that the said company shall have power to construct the railroad from Amelia Island on the Atlantic to the waters of Tampa Bay, in South Florida, with an extension to Cedar Keys in East Florida, under the provisions of an act to provide for and encourage a liberal system of internal improvements in this State, approved the 6th day of January, A. D. 1855."

And the said Florida Railroad Company accepted the provisions of said amendment, and undertook to construct said lines of road in
21 accordance with the said notice of acceptance filed with the said trustees of the internal improvement fund of the State of Florida.

And this plaintiff further alleges, upon information and belief, that so much of the line of road from Amelia Island to the waters of Tampa Bay, as lies between Amelia Island and Waldo, a station on said railroad, about eighty miles from Amelia Island, together with the said extension to Cedar Keys, has been constructed under said charter and amendment thereto, and the grading on about forty miles of said road between Waldo and Tampa has been done, but the line from Amelia Island to the waters of Tampa Bay has not yet been completed.

And this plaintiff further alleges upon information and belief that Edward N. Dickerson is now the president of said Florida Railroad Company, and that David L. Yulee, Marshall O. Roberts, and Isaac K. Roberts are directors of said company.

And this plaintiff further alleges, upon information and belief, that some time prior to the 22d day of November, 1858, Joseph Finegan, Archibald H. Cole, and Alexander McRae, partners under the name of Joseph Finegan & Co., contracted with the said Florida Railroad Company to construct so much of said railroad as lay between Amelia Island on the Atlantic and Cedar Keys in East Florida. That in the execution of said contract the said Joseph Finegan & Co. contracted with the firm of Vose, Livingston & Co., a firm then doing business in the city of New York, and composed of this plaintiff and Edward Livingston and Charles L. Perkins, for the purchase of eight thousand tons of iron rails, to be delivered to them, the said Joseph Finegan & Co., at Fernandina, Florida, as will more fully appear by reference to said contract, a copy of which is hereunto annexed, marked Exhibit A and Exhibit B, and which the plaintiff prays may be taken as part of the complaint.

22 And this plaintiff further alleges that the said Vose, Livingston & Co., in compliance with their contract with the said Joseph Finegan & Co., delivered a large quantity of iron rails at Fernandina, Florida, for which they received the promissory notes of the said Joseph Finegan & Co., as provided for in said contracts, to the extent of one hundred and fifty-four thousand six hundred and thirty-two dollars and ninety-two cents, but did not receive the bonds provided for in said contracts as collateral security for the payment of said notes. And which said notes were in part indorsed by David L. Yulee, and said notes were not paid at maturity, nor any part thereof, and which said notes remained unpaid on the 31st day of October, 1858.

And this plaintiff further alleges that on the 4th day of May, 1858, the Florida Railroad Company, by their president, David L. Yulee, en-

tered into an obligation to the said Vose, Livingston & Co., by which obligation the said company undertook to guarantee the delivery by Joseph Finegan & Co. of two hundred and forty thousand dollars of certain bonds therein described in part execution of the contract of the said Joseph Finegan & Co., which will more fully appear by reference to said obligation, a copy of which is hereunto annexed, marked Exhibit C, and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges that on the 19th day of October, 1858, the said Florida Railroad Company entered into an obligation to the said Vose, Livingston & Co., with the assent of the said Edward N. Dickerson, as assignee of Joseph Finegan & Co., for the delivery of an irrevocable order for certain bonds therein described to secure the payment of eight hundred tons of iron embraced in the contract of said Joseph Finegan & Co. with the said Vose, Livingston & Co., and to be delivered to said railroad company, which will more fully appear by reference to said obligation and assent, copies of which are hereunto annexed, marked Exhibit D, and which this plaintiff prays may be taken as part of this complaint.

23 And this plaintiff further alleges that, under date of the 19th of October, 1858, the defendant, Edward N. Dickerson, representing himself as vice-president of said Florida Railroad Company, entered into an agreement as such vice-president with Vose, Livingston & Co., in regard to five hundred tons eight hundred weight and two-quarters of the iron rails which had been the subject of contract with said Joseph Finegan & Co., and in his character of assignee of Joseph Finegan & Co. gave his assent in writing to the execution of said agreement, all of which will more fully appear by reference to said agreements and assent, copies of which are hereunto annexed, marked Exhibit E, and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges that, under date of the twenty first of October, 1858, the said Edward N. Dickerson, as vice-president of said Florida Railroad Company, addressed a communication to the said Vose, Livingston & Co., consenting, on the part of the said Florida Railroad Company, to make absolute a certain contract therein stated and described, as will more fully appear by reference to said communication, a copy of which is hereunto annexed, marked "Exhibit F," and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges that, on the 31st day of October, 1858, David L. Yulee was president of said Florida Railroad Company, and that the said Florida Railroad Company on that date entered into an obligation in writing signed by their said president, by which obligation the said Florida Railroad Company agreed and promised to adopt and carry out the contract of the said Joseph Finegan & Co. with the said Vose, Livingston & Co., with such modifications as are provided for in said obligation, and to pay to the said Vose, Livingston & Co. the amount due by said Joseph Finegan & Co., in manner and form as is set forth in said obligation, all of which will more fully appear by reference to said obligation, a copy of which is hereunto annexed, marked "Exhibit G," and which this plaintiff prays may be taken as part of this complaint.

24 And this plaintiff further alleges that, in compliance with the above-named obligation, the said Florida Railroad Company, at or about the time of executing said obligation at the city of New York, duly made and caused to be subscribed in their behalf, by their said president, David L. Yulee, and delivered to the said Vose, Livingston & Co., their certain thirty-three promissory notes in writing, all bearing

date at said city of New York, on the 1st day of November, 1858, and all payable nine months from the date thereof, at the Bank of the Republic, in the city of New York, by each of twenty-six of which notes the said defendant, the Florida Railroad Company, promised to pay in nine months from the date thereof, at the bank aforesaid, to the order of David L. Yulee, five thousand dollars, and by one other of which notes the defendants, the said Florida Railroad Company, promised to pay in nine months after the date thereof, at the bank aforesaid, to the order of said David L. Yulee, three thousand four hundred and fifty-eight dollars and ninety-three cents. That the above described twenty-seven of the notes aforesaid, amounting in the aggregate to one hundred and thirty-three thousand four hundred and fifty-eight dollars and ninety-three cents, made payable to the order of the said David L. Yulee, were duly endorsed by him in blank at the time when they were delivered to the said Vose, Livingston & Co.; and by each of four others of said notes, the said defendant, the Florida Railroad Company, promised to pay in nine months from the date thereof, at the bank aforesaid, to the order of said Vose, Livingston & Co., four thousand one hundred and one dollars and fifty-three cents, for value received, the said four notes being for the aggregate sum of sixteen thousand four hundred and six dollars and twelve cents; and by one other of which notes the said railroad company promised to pay in nine months from the date thereof, to the order of said Vose, Livingston & Co., four thousand one hundred and one dollars and fifty-nine cents for value received; and by the other of which notes the said Florida Railroad Company promised to pay, nine months after the date thereof, to the order of said Vose, Livingston & Co., two thousand two hundred and thirty-four dollars and ninety-eight cents; and the aggregate amount of the above described thirty-three promissory notes was one hundred and fifty-six thousand three hundred and one dollars and sixty-two cents.

And this plaintiff further alleges that the said defendant, the Florida Railroad Company, in further execution of their said obligation, dated on the 31st day of October, 1858, and after the making and delivery to the said Vose, Livingston & Co. the above-described thirty-three promissory notes, did pledge to, and deposit with, and left in the hands of said Vose, Livingston & Co., as collateral security for the payment of said thirty-three notes, one hundred and ninety-five bonds issued by said Florida Railroad Company, executed under their corporate seal, and attested by the signatures of their president and secretary, bearing date the first day of March, 1856. Each of which bonds was conditioned for this payment by said company to the bearer thereof of one thousand dollars, on the first day of March, in the year eighteen hundred and ninety-one, in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of March and September in each year, and which semi-annual interest was represented by coupons attached to said bonds, payable to the bearer in the city of New York. The said one hundred and ninety-five bonds were known as internal improvement bonds of the Florida Railroad Company, and were issued by authority of an act of the general assembly of the State of Florida, entitled, "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6th, 1855.

And this plaintiff further alleges that the said the Florida Railroad Company wholly failed to pay the thirty-three notes hereinbefore mentioned at maturity, or any or either of them, and that the said notes were respectively on the day when they fell due presented at the place

of payment therein specified, and payment thereof was then
26 and there duly demanded and refused, and the said notes respectively were thereupon duly protested for non-payment, and the said Florida Railroad Company and the said David L. Yulee were duly notified of such protests.

And this plaintiff further alleges that the said firm of Vose, Livingston & Co. was dissolved on or about the day of , 1860; and all the interests of the said Edward Livingston and Charles L. Perkins in the said thirty-three notes and the said one hundred and seventy-five bonds, together with their entire interests in the property and effects of said firm of Vose, Livingston & Co., were transferred to and vested in this plaintiff, and that he individually held and owned the said thirty-three promissory notes of the defendant, the said Florida Railroad Company, and that he still holds and owns in his own individual rights such parts of the same as has not been paid in manner and form hereinafter stated.

And this plaintiff further alleges that, under date of the 1st day of March, 1860, the semi-annual interest then due on the said one hundred and ninety-five bonds, amounting to six thousand eight hundred and twenty-five dollars, was collected, and that under date of September 1st, 1860, the semi-annual interest then due on said one hundred and ninety-five bonds, amounting to six thousand eight hundred and twenty-five dollars, was collected, and the two amounts so collected, amounting in the aggregate to thirteen thousand six hundred and fifty dollars, were allowed as a credit to said railroad company by this honorable court, as will hereafter more fully appear.

And this plaintiff further alleges that, on or about the 13th day of December, 1865, he commenced an action against the defendants, the Florida Railroad Company, in the superior court of this State in and for the city and county of New York, for the amounts due on said thirty-three promissory notes, and for the sale of said one hundred and
27 ninety-five bonds, and the application of the proceeds thereof; and on the 27th day of December, 1866, obtained a judgment against said Florida Railroad Company for the balance due on said notes, with interest thereon to that date of two hundred and twenty-one thousand seven hundred and eighteen dollars and twenty-three cents, with an order for the sale of said one hundred and ninety-five bonds, and the application of the proceeds thereof, as will more fully appear by reference to said judgments, a copy of which is hereunto annexed, marked "Exhibit H," and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges that under and by the authority of the judgment of this honorable court the said one hundred and ninety-five bonds were duly sold by John Kelly, the sheriff of the county of New York, for the sum of eighty eight thousand three hundred and thirty-five dollars, which, after deducting the cost and official charges, left the sum of eighty-seven thousand nine hundred and forty-two dollars and seventy-six cents, which sum was passed to the credit of said judgment and interest on the 1st day of February, 1867, and left a balance due on said judgment on that date of one hundred and thirty-six thousand five hundred and thirty-four dollars and sixty-three cents, as will more fully appear by the report of said sheriff, a copy of which is hereunto annexed, marked "Exhibit J," and which this plaintiff prays may be taken as part of this complaint, and which sum of $136,534.63, with interest, is still due and unpaid.

And this plaintiff further alleges, upon information and belief, that on

or about the day of May, 1858, the above-named Joseph Finegan & Co., the original contractors for the construction of the said Florida Railroad, sold and assigned their said contracts to construct said Florida Railroad to the defendants, Edward N. Dickerson and his associates, and that the said Edward N. Dickerson and associates were regularly accepted by the said railroad company as contractors in the place of said Joseph Finegan & Co., and that the said Edward N. Dickerson
28 and associates agreed with the said Joseph Finegan & Co., and obligated themselves, to execute and perform the contracts of the said Joseph Finegan & Co., with the said Florida Railroad Company, and that they would execute and perform the contracts of the said Joseph Finegan & Co., with the said Vose, Livingston & Co., and would pay and discharge the notes and liabilities of the said Joseph Finegan & Co. to the said Vose, Livingston & Co., for the iron delivered and to be delivered under the said contract above mentioned, marked "Exhibit B."

And this plaintiff further alleges, upon information and belief, that the said Edward N. Dickerson and his associates, early after the date of their said contract with the said Joseph Finegan & Co., entered into an agreement or contract with the Florida Railroad Company, or with David L. Yulee, as president of said railroad company, and with the defendant, David L. Yulee, individually, by which agreement or contract the said Florida Railroad Company and the said David L. Yulee consented to aid the said Edward N. Dickerson and his associates in securing an extension of time for the payment of the notes of the said Joseph Finegan & Co. due to the said Vose, Livingston & Co., and the payment of which had been assumed by the said Edward N. Dickerson and associates to the said Joseph Finegan & Co., as above recited, and for the purpose of securing such extension; and in accordance with said agreement, the said Florida Railroad Company, by their president, David L. Yulee, and the said David L. Yulee, individually, at the special instance and request of said Edward N. Dickerson and associates, offered to substitute the credit of the said Florida Railroad Company by giving the notes of the said Florida Railroad Company at nine months from the date thereof, in substitution for the notes of the said Joseph Finegan & Co., with the indorsement of the said David L. Yulee on so many of said notes as he had indorsed for said Joseph Finegan & Co.; but neither the said Edward N. Dickerson nor his associates, nor the said Florida Railroad Company, nor the said David L. Yulee, nor any other
29 person for them or either of them, informed the said Vose, Livingston & Co., that the said Edward N. Dickerson and associates (a firm abundantly able to pay the said notes of the said Joseph Finegan & Co., then due and under protest) had contracted to pay said notes, and had received from said Joseph Finegan & Co. a valuable consideration for said contract, all of which the said Vose, Livingston & Co. were wholly ignorant until a few weeks prior to the commencement of this suit.

And this plaintiff further alleges, upon information and belief, that the contracts of the said Florida Railroad above described, and a copy of which is annexed, marked "Exhibit G," dated October 31, 1858, purporting to be the contracts of the Florida Railroad Company, was in equity and good conscience the contract of the said Edward N. Dickerson and his associates, and that the notes of the said Florida Railroad Company and the indorsements of the said David L. Yulee given to said Vose, Livingston & Co. in substitution for the notes of said Joseph Finegan & Co., were so given only as a security for the said Edward N.

Dickerson and associates, at their request and for their benefit, and with a full and perfect understanding between the said Florida Railroad Company and the said David L. Yulee and the said Edward N. Dickerson and associates, that the said Edward N. Dickerson and associates would pay and discharge said notes at the maturity thereof. And for the better securing of the said Florida Railroad Company and the said David L. Yulee against loss or damage by reason of their said notes and indorsements in aid of Edward N. Dickerson and associates, the said Edward N. Dickerson and associates deposited with the said David L. Yulee, individually, and as president of said railroad company, a large number of the coupon bonds issued by said railroad company, some of which were known as seven per cent. internal improvement bonds and other eight per cent. Freeland bonds, together with seven thousand four hundred and thirty-four shares of the capital stock of said Florida Railroad Company, amounting to seven hundred and forty-three
30 thousand four hundred dollars of said capital stock, together with a large amount of real estate in the city of Fernandina, in the State of Florida, of great value, together with such balance, if any, as might be found due to them, the said Edward N. Dickerson and associates, upon the completion of their said contracts for constructing said railroad; all of which securities, as this plaintiff is informed and believes, were hypothecated and pledged to and placed in possession of the said David L. Yulee, in his individual character, or as president of said Florida Railroad, by the said Edward N. Dickerson and associates, as collateral security for the performance of their contracts or agreements with the said Florida Railroad Company and the said David L. Yulee respectively, to pay at maturity the notes given by said railroad company, and discharge the endorsements of the said David L. Yulee, made and given for the aid and benefit of the said Edward N. Dickerson and associates as above alleged.

And this plaintiff further alleges that, in the year 1858, and subsequent, as this plaintiff is informed and believes, to the date of the purchase of the contract from the said Joseph Finegan & Co., to construct the said Florida Railroad by the said Edward N. Dickerson and associates, the defendant, Edward N. Dickerson, negotiated with said Vose, Livingston & Co., in his official character of vice-president of said Florida Railroad Company, in regard to the iron, which was the subject of the original contract with the said Joseph Finegan & Co., and in his character of vice-president, actually negotiated the contract afterward reduced to writing by said Florida Railroad Company, under date of October 31, 1858, as by reference to his letter under date of October 21st, 1858, a copy of which is above annexed, as Exhibit F, will more fully appear.

And this plaintiff further alleges that, in the month of October, 1868, while the said notes of Joseph Finegan & Co. remained unpaid, and had been for many months under protest, during a large part of which
31 time the said Edward N. Dickerson and associates were, as this plaintiff is informed and believes, under obligations to the said Joseph Finegan & Co. to pay said notes and to execute the contracts of the said Joseph Finegan & Co., with the said Vose, Livingston & Co., the said Edward N. Dickerson represented himself to the said Vose, Livingston & Co. as acting as vice-president of said Florida Railroad Company, and as assignee of Joseph Finegan & Co., and concealed from the said Vose, Livingston & Co. the material fact that the and his associates were under obligations to pay and discharge the debts of the said Joseph Finegan & Co.; and the said Edward N. Dickerson and

the said Florida Railroad Company, by their president, David L. Yulee, represented that the said Joseph Finegan & Co. had discontinued their work upon said railroad, and that the said Florida Railroad Company proposed to proceed by themselves with the construction of said railroad, and had agreed to assume the contract of the said Joseph Finegan & Co. with said Vose, Livingston & Co., and to execute and perform the same as modified by a verbal agreement as reduced to writing on the 31st day of October, 1858.

And the said Edward N. Dickerson, as one of the assignees of Joseph Finegan & Co., having in writing released the said Vose, Livingston & Co. from liability to the said Joseph Finegan & Co., or to him, the said Edward N. Dickerson, as their assignee, on account of their said contract, and consented to the substitution of the said Florida Railroad Company for the said Joseph Finegan & Co., agreed further that the said Vose, Livingston & Co. might retain the contract on the part of Joseph Finegan & Co. as security for the payment of the notes to be given in substitution by the said Railroad Company, as by reference to which release and consent will more fully appear, a copy of which is hereunto annexed, marked Exhibit L, and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges that, during the period in
32 which the above-mentioned negotiations were being conducted by the said David L. Yulee, as president of the said Florida Railroad Company, and the said Edward N. Dickerson, as vice-president of said Railroad Company, and as one of the assignees of the said Joseph Finegan & Co., with the said Vose, Livingston & Co., the said Joseph Finegan & Co. were represented to the said Vose, Livingston & Co., by the said David L. Yulee, and the said Edward N. Dickerson, as insolvent, and utterly unable to carry out their contracts with the said Florida Railroad Company, or with the said Vose, Livingston & Co., and that the best hope of the said Vose, Livingston & Co., for saving themselves from heavy loss was in accepting the proposal of the Florida Railroad Company, as embraced in the contract of the 31st of October, 1858, hereinbefore referred to as Exhibit G.

Whereas this plaintiff is informed and believes that the said Edward N. Dickerson and associates had not only entered into an obligation to said Joseph Finegan & Co. to pay said debts, and execute the contracts of Joseph Finegan & Co. with said Vose, Livingston & Co., a large sum in bonds and money for their assignment of their contract to construct said railroad, and that the said Joseph Finegan, Archibald H. Cole, and Alexander McRae were then and still are possessed of large property.

And this plaintiff alleges and insists, that the said representations and concealments were against equity and good conscience, and were calculated and intended to deceive and defraud, and did deceive and defraud, the said Vose, Livingston & Co.

And this plaintiff further alleges, upon information and belief, that the one hundred and ninety-five bonds of the said Florida Railroad Company deposited with the said Vose, Livingston & Co. as collateral security for the payment of the notes of the said Florida Railroad Company as above described, were the property of the said Edward N. Dickerson and associates, being a part of the collateral security above de-
33 scribed as deposited by the said Edward N. Dickerson and associates with the said David L. Yulee individually, or as president of said Florida Railroad Company, to be hypothecated with said Vose, Livingston & Co. as security for said notes, and for the protection

of said Florida Railroad Company and said David L. Yulee for their said obligation entered into, for account of said Edward N. Dickerson and associates.

And this plaintiff further alleges, upon information and belief, that on or about the day of , 1858, Marshall O. Roberts, of the city of New York, was a stockholder in said Florida Railroad Company, and was duly elected a director of the said Florida Railroad Company, and accepted the office of such director; that as such director he represented the said Florida Railroad Company in this honorable court, and on the 12th day of March, 1866, filed as such director *in* answer under oath to the complaint of this plaintiff in his action against the said Florida Railroad Company, as above more fully disclosed and which will more fully appear by reference to said answer, a copy of which is hereunto annexed, marked Exhibit M, and which this plaintiff prays may be taken as part of this complaint.

And this plaintiff further alleges, upon information and belief, that the firm of Edward N. Dickerson and associates was composed of the defendants, Edward N. Dickerson and Marshall O. Roberts, and divers other persons at present unknown to this plaintiff, but whose names when discovered plaintiff prays he may be at liberty to insert as defendants hereto.

And this plaintiff further alleges that the capital stock of the Florida Railroad Company, authorized by their original charter, approved January 8, 1853, was one million dollars, and that by the third section of an act of the general assembly of the State of Florida, entitled "An act to amend an act incorporating the Florida Railroad Company," approved December 14th, 1855, it is provided "that the capital stock of said
34 company may be increased from time to time in such amounts and in such manner as the directors may authorize and order, not exceeding six millions of dollars."

And this plaintiff further alleges, upon information and belief, that a large number of shares of said capital stock were issued from time to time by said directors, and certain instalments, therein acknowledged by said directors, or by the officers of said company as paid on said shares; but excepting shares held by the trustees of the internal improvement fund of the State of Florida, received in payment for interest advanced for said company as required by law, none of said shares were paid in full, but a large amount remained due on said shares to said railroad company; and of the shares so issued one thousand six hundred and four, of the par value of one hundred dollars each, were issued to the defendant, Edward N. Dickerson, or to Edward N. Dickerson and associates, or were held or owned by him or them, on the sixth day of October, 1866, and on the first day of November, 1866, and that a small per cent. only of the par value of said shares had been paid to the said Florida Railroad Company by the said defendant or defendants, or by any other person for them, on the first day of November, 1866, and that a large amount of money was due at the above dates, and still remains due to the said Florida Railroad Company on account of said shares. And of the shares so issued seven thousand four hundred and thirty-four were, as this plaintiff is informed and believes, issued in the name of David L. Yulee, and by him held as agent on interest for said Edward N. Dickerson and his associates, and as a further security for the payment of the obligations of the said Florida Railroad Company and the said David L. Yulee, entered into to this plaintiff and others, for the account and benefit of the said Edward N. Dickerson and associates, and upon

which said seven thousand four hundred and thirty-four shares a small per cent. only had been paid by said Edward N. Dickerson and associates, or by any other person for them, on the first day of November, 1866, and that a large amount of the par value of said shares remained due to said railroad company by the said Edward N. Dickerson and associates on the said first day of November, 1866, and that they are still indebted for the unpaid installments on said shares more than enough to pay the demand of this plaintiff.

And this plaintiff further alleges, upon information and belief, that a large number of the shares of said capital stock had been issued to divers other persons, at present unknown to this plaintiff, and upon which shares a large amount of money remained due and unpaid on the said 1st day of November, 1866, more than enough to pay this plaintiff's claim.

And this plaintiff further alleges, upon information and belief, that prior to the 6th day of October, 1866, the above-named defendants, David L. Yulee, Edward N. Dickerson, and Marshall O. Roberts, directors of said railroad company, not only failed to collect the large amounts due on stock accounts, as above set forth, and pay the sinking-fund due to the internal improvement fund of the State of Florida, and the amount due to this plaintiff, but colluded together to induce the trustees of the internal improvement fund of the State of Florida to sell the said Florida Railroad, and for this purpose the said David L. Yulee, Marshall O. Roberts, and Edward N. Dickerson, or some of them, represented to the said trustees that the said railroad company was wholly unable to pay to said trustees the sinking-fund due upon the bonds issued by said company and guaranteed by said trustees, and concealing from said trustees the fact that there were large assets belonging to said company, induced said trustees to sell said railroad for cash in a country where it was well known there was no cash with which to purchase so large an enterprise, and said road was, at the special instance and procurement of said Edward N. Dickerson, Marshall O. Roberts, Isaac K. Roberts, David L. Yulee, and their associates, or some of them, sold by said trustees, on the 1st day of November, 1866, under the order of the
36 said trustees of the 6th day of October, 1866, at Gainesville, in the State of Florida, a point far in the interior of said State, remote and almost inaccessible from the commercial cities of the country, and on a notice so short and inadequate as to forbid the hope of securing a proper competition at said sale.

And this plaintiff further alleges that the bidders at said sale were Edward N. Dickerson and Isaac K. Roberts, who bid alternately until the property was struck off to Isaac K. Roberts at 323,400 dollars by agreement, as this plaintiff is informed and believes, between the said Edward N. Dickerson, Isaac K. Roberts, and their associates, and the title-deeds to said railroad, with all its property of every description, together with its franchise, was executed and delivered by the said trustees of the internal improvement fund of the State of Florida to Edward N. Dickerson and his associates, as will more fully appear by reference to the proceedings of said trustees, copies of which are herewith annexed, marked "Exhibits ," and which are to be taken as part of this complaint.

And this plaintiff further alleges, upon information and belief, that the said Florida Railroad Company, with its franchise and all its property of every kind, is now held by the said Edward N. Dickerson, Marshall O. Roberts, David L. Yulee, and their associates (not now known

to this plaintiff), under the name of Edward N. Dickerson and associates, in fraud of this plaintiff's rights as a creditor of said railroad company.

And this plaintiff claims and insists that, by the terms of the contract of the said Edward N. Dickerson and his associates, including the said Marshall O. Roberts, with Joseph Finegan & Co., by which they procured the assignment of their contract for the construction of the said Florida Railroad, they became the principal debtors to the said Vose, Livingston & Co., for the iron rails and materials furnished to said Joseph Finegan & Co., to construct said Florida Railroad, and
37 that they, the said Edward N. Dickerson and associates, including the said Marshall O. Roberts, are obligated both in law and equity to pay the said indebtedness.

And this plaintiff further claims and insists that he is entitled to be subrogated to all the rights of the Florida Railroad Company or of David L. Yulee, as the endorser for said company, against said Edward N. Dickerson and his associates, including said Marshall O. Roberts, for all securities hypothecated by them, the said Edward N. Dickerson and associates, or contracts or guarantees made by them to indemnify or hold harmless the said Florida Railroad Company or the said David L. Yulee for their obligations entered into to the said Vose, Livingston & Co., in the contract of October 31st, 1858, above presented as Exhibit G, and to all the rights which the said Florida Railroad Company or the said David L. Yulee would have had against the said Edward N. Dickerson and associates, had they, the said railroad company or the said David L. Yulee, paid and discharged their obligations to the said Vose, Livingston & Co. at the maturity thereof.

And this plaintiff further claims and insists that he is entitled to be subrogated to the rights of the said Florida Railroad Company in regard to all amounts due from any party to this action on account of unpaid installments on stock in said company or otherwise.

And this plaintiff further claims and insists that the said Edward N. Dickerson, Marshall O. Roberts, Isaac K. Roberts, David L. Yulee, and their associates, should be required by the decree of this honorable court to hold the rents, profits, and incomes of said Florida Railroad, together with the amounts due to said Florida Railroad Company, in trust for the payment of the amounts due this plaintiff, as above set forth.

This plaintiff therefore respectfully asks the aid of this honorable court in the premises that the associates of the said Edward N.
38 Dickerson in the purchase of the said contracts from the said Joseph Finegan & Co., who are not herein named as parties to this action, may, when discovered, be brought in and be made parties defendant. And that the said Edward N. Dickerson, Marshall O. Roberts, and all other associates of said Edward N. Dickerson, when discovered and made parties to this action, may, by the judgment and decree of this honorable court, be directed to pay this plaintiff the amounts of his claim hereinbefore set forth of one hundred and thirty-six thousand five hundred and thirty-four dollars and sixty-three cents, with interest from the 1st day of February, 1867, and costs of this action; and for such further or for such other relief in the premises as to this honorable court may seem equitable and right.

J. E. & J. D. BROOME,
62 Broadway, New York, Plaintiff's Att'ys.

STATE OF NEW YORK,
County of New York, ss:

Francis Vose, the plaintiff above named, being duly sworn, says that

the foregoing complaint is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those he believes it to be true.

F. VOSE.

Sworn to and subscribed before me this 15th day of February, 1868.

ELEAZAR MIELAR,
Notary Public, New York County.

39 EXHIBIT A.

NEW YORK, 22*d November*, 1856.

Memorandum of an agreement made this day between Vose, Livingston & Co., of New York, and Mess'rs Joseph Finegan & Co., contractors for building the Florida Railroad, for railroad iron.

1. Vose, Livingston & Co. agree to sell, and Mess'rs Joseph Finegan & Co. agree to buy, two thousand tons of rails positively, and eight thousand tons, or any part thereof, at the sellers' option, to be used on the Florida Railroad.

2. Two thousand tons of this contract is now made binding on both parties, and it is agreed that the sellers have the privilege for two months of extending it on the following terms for any amount not exceeding in all ten thousand tons.

3. The iron to be of the best quality Welsh rails usually imported to America, of the Erie pattern, weighing about 58 or 60 pounds per linear yard, to be delivered at the ship's side, at Fernandina, Florida, in bond, at the price of fifty-three dollars (53) per ton of 2,240 pounds.

4. Payment to be made for the 2,000 tons in Mess'rs Joseph Finegan & Co.'s notes, indorsed by D. L. Yulee individually, one-half at nine months and one-half at twelve months from the date of bills of lading from Great Britain, and for the 8,000 tons in Mess'rs Joseph Finegan & Co.'s notes at twelve months, or at the sellers' option in nine, twelve, and fifteen months from date of bills of lading from Great Britain. All the notes to bear interest at the rate of seven per cent. per annum, to be payable in the city of New York, and drawn in the favor as
40 per copy annexed, on receipt of the bills of lading by the seller.

5. The payment of notes to be secured by a deposit with the sellers of the Florida Railroad Company first-mortgage bonds, guaranteed by the internal-improvement fund of Florida to the extent authorized by law—say $8,000 per mile—which bonds are to be delivered without delay as soon as they can be obtained. The sellers are to have the option at any time before the maturity of the notes to take payment for the whole or any part of the rails in the first-mortgage bonds at the rate of eighty cents on the dollar here, it being understood, in case of such settlement, that the price of the iron so to be paid for shall be at the cash price mentioned in the contract, and interest from date of shipment to date of such determination to take the bonds and the delivery of the same.

6. The sellers are to collect the interest on the bonds as it becomes due, and credit it to Mess'rs Joseph Finegan & Co. in general account.

7. Shipments to be made direct to Fernandina at the rate of, say, 1,000 to 1,500 tons per month, beginning in January or February, 1857, the buyers to have the option of ordering part of the iron shipped to Cedar Keys instead of Fernandina.

8. The buyers agree to pay the excess of freight, if any, above six dollars per ton from Great Britain to Florida in cash on the arrival of

the rails at Fernandina or Cedar Keys; also, if required, one quarter of the balance of the freight, which is guaranteed not to exceed six dollars ($6) per ton, on arrival of the iron, which latter is to be deducted from the price of the iron, and a proportional amount of the bonds released from deposit.

9. In case any iron is shipped to Cedar Keys, the buyers agree to pay any excess of insurance that may be charged above that to Fernandina.

41 10. The buyers have the option to pay for a part or the whole of the 2,000 tons in cash on delivery at the rate of ($47) forty-seven dollars per ton of 2,240 pounds, and for any part of the balance at forty-nine dollars ($49) per ton.

11. The rails delivered in compliance with this contract shall be used exclusively on the Florida Railroad, and for no other purpose.

12. The sellers are not to be held responsible for delay or non-delivery of iron caused by act of war or foreign enemies.

13. As security for the faithful fulfilment of this contract, the buyers agree to deposit within thirty days from date with the sellers, Freeland, bonds of the Florida Railroad Company in amount equal to five dollars ($5) per ton on the 2,000 tons, estimating the bonds at their cash market value; and also to make further deposit at the same rate within thirty days after notice from the sellers of their intention to extend the contract for a farther amount.

14. It is further agreed that Vose, Livingston & Co. will subscribe for $25,000 of the Freeland bonds of the said company, to be paid for as stated in a list now in the hands of Mess'rs Riggs & Co. of New York.

15. Should the notes not be paid at maturity, the holders are authorized to sell the bonds deposited as collateral any time thereafter at the brokers' board, or at public or private sale, on giving five days' notice to Mess'rs Riggs & Co., New York, except those deposited with notes endorsed by D. L. Yulee, for which thirty days' notice to J. T. Soutter, esq., New York, is to be given before sale.

VOSE, LIVINGSTON & CO.
JOS. FINEGAN & CO.

Witness:
T. J. MAGUIRE.

42 *Form of note.*

NEW YORK, 185 .

months after date we promise to pay or order dollars, for value received, with interest at the rate of seven per cent. per annum.

ALEX. McRAE,
Wilmington, N. C.
JOS. FINEGAN,
Jacksonville, Fla.
A. H. COLE,
Orange Mills, Fla.

Compose the firm of Finegan & Co.

EXHIBIT B.

NEW YORK, *January* 14, 1857.

(Duplicate.)

Mess'rs JOSEPH FINEGAN & CO.:

GENTLEMEN: Referring to our agreement with you under date of November 22, 1856, we now propose and agree to extend the quantity, and to furnish you eight thousand tons, the price of the whole quantity to be increased to fifty-seven dollars and fifty cents per ton, subject to the same conditions specified in the before-mentioned agreement. The notes for the whole quantity to be at nine, twelve, and fifteen
43 months from date of bills of lading payable in November. M'r Yulee's endorsement to be limited to two thousand tons, and you are to have the option of paying cash on delivery at Fernandina, at the rate of fifty-one dollars and fifty cents for two thousand tons, and for any part of the balance at fifty-three dollars and fifty cents per ton. It is understood that we are to have the privilege of delivering a parcel of about three hundred tons lighter rails, as per section shown, weighing from fifty to fifty-one pounds per linear yard. It is further understood that the bonds as collateral for the notes are to be held in New York by the sellers or their agents. It is understood that for the notes payable in London the buyers are to pay as the contract price fifty-seven and $\frac{50}{100}$ dollars per ton in cash fifteen days before the said notes mature, which shall be a full discharge of the same.

Yours, respectfully,

VOSE, LIVINGSTON & CO.

NEW YORK, *January* 14, 1857.

Messrs. VOSE, LIVINGSTON & CO.:

GENTLEMEN: We have received your letter of this date, in which you propose and agree to extend our contract with you under date of Nov. 22, 1856, for railroad iron for the Florida Railroad Company to eight thousand tons. We hereby accept your proposal and agreement to furnish us with eight thousand tons at the increased price named in your letter, and agree to receive the same upon terms and conditions mentioned in your letter, and on contract with you above referred to.
44 It is distinctly understood as the meaning and intention of this letter, that we are in no contingency to be required to pay more than $57\frac{50}{100}$ dollars per ton, with the interest due at the time of payment.

Very respectfully yours,

JOSEPH FINEGAN & CO.

EXHIBIT C.

NOV. 1, '69.

Memorandum of an agreement made May 4, 1858, between the Florida Railroad Company of the first part, and Vose, Livingston & Co. and the Ebber Vale Co., of the second part:

Whereas Vose, Livingston & Co., partly on their own account, and partly as agents of the Ebber Vale Company, heretofore contracted with Joseph Finegan & Co. for sale to them of a large quantity of iron to be used in the construction of the Florida Railroad, to be settled for by

notes of said Joseph Finegan & Co., secured by deposit of bonds of said railroad company guaranteed by the internal improvement fund of the State of Florida; and there is now at Fernandina a large amount of such iron which is and long has been ready for delivery to said Joseph Finegan & Co. upon compliance by them with the terms of such contract of sale, but said Joseph Finegan & Co., although they have given notes for such iron, have not yet been enabled to make the stipulated deposit of bonds, wherefore delivery of said iron is withheld, and the amount of such bonds in respect whereof the said Joseph Finegan & Co. are in default is more than two hundred and forty thousand dollars.

And whereas it is of great importance to the interest of said company that said Joseph Finegan & Co., the contractors for said
45 road, shall be enabled to go on with the construction thereof, and to that end they have applied to the parties of the second part to deliver to said Joseph Finegan & Co. enough of the aforesaid iron to reach the "eighty-mile station," so called, but not to exceed four hundred (400) tons, without exacting immediate compliance with the terms of such contract, and the parties of the second part have assented thereto upon condition of the execution of this agreement:

Now, in consideration of the premises, and of the order this day given by the Ebber Vale Co., through S. Crooke, their agent in New York, for the delivery of such iron not exceeding the quantity aforesaid, and in further consideration of one dollar to them paid, at and before the execution hereof, and of other valuable considerations, the receipt whereof is hereby acknowledged, the said The Florida Railroad Company do hereby guarantee to the party of the second part that such iron shall be duly laid upon the said Florida railroad, and that said road shall, by the fourth day of August, be constructed to the aforesaid eighty-mile station, socalled, being a distance of eighty miles from Fernandina, so as to entitle the company to receive from the internal improvement fund a guarantee of the bonds of said company in accordance with the provision of the statute of the State of Florida, in that behalf, to the amount of two hundred and forty thousand dollars over and above those already received, and that as soon as received by the company, but no later than by the fourth day of September, such bonds guaranteed by the internal improvement fund of the State of Florida, to the extent of two hundred and forty thousand dollars, shall be delivered over by said Joseph Finegan & Co., or by said company on their behalf, to said Vose, Livingston & Co. and the Ebber Vale Co., in accordance with the provisions of the above-mentioned contract between Vose, Livingston & Co. and Joseph Finegan & Co., heretofore given to Vose, Livingston & Co., for the price of iron now lying at Fernandina, it being understood that upon receiving such deposit of bonds Joseph Finegan & Co.
46 are to receive delivery of such proportion of such iron as, with the quantity now delivered, will correspond with the amount of collateral security in bonds thus given according to the provisions of the contract; the division of such bonds between Vose, Livingston & Co. and the Ebber Vale Co. shall be such as they may agree upon between themselves, but the custody of the bonds shall not be separated from the notes for which they are collateral, and the bonds coming to the Ebber Vale Co., as collateral for the notes held by them, shall be given directly to them.

It is understood that the two hundred and forty thousand dollars of bonds above mentioned are parcel of the bonds which will be payable or deliverable by the company to Joseph Finegan & Co. under their con-

tract, in part payment of the contract-price for building said road, and the company guarantees that said Joseph Finegan & Co. have assented, or will assent, to the delivery of bonds to the parties of the second part, as hereby stipulated for, and it is understood that the risk of Joseph Finegan & Co.'s so far executing their contract as to entitle them to the said two hundred and forty thousand dollars of bonds above guaranteed to be delivered is assumed by the said railroad company, and not by the parties of the second part.

In testimony whereof this instrument is executed on behalf of said company by the president thereof, and by the said Vose, Livingston & Co., and by the Ebber Vale Co., by S. Crooke, their agent, the day and year first above written.

D. L. YULEE.
President of the Florida R. R. Co.

EXHIBIT D.

NOVEMBER 1, 1868.

Whereas a conditional and provisional arrangement subject to
47 the approval of the Ebber Vale Company has been made with the Florida Railroad Company, whereby said railroad company is to assume with certain modifications the performance of the contract heretofore made by Joseph Finegan & Co. with Vose, Livingston & Co., (acting in their own behalf, and in the behalf of the Ebbervale Company), for the purchase of eight thousand tons of railroad iron;

And whereas, before the expiration of the period during which it is to be ascertained whether or not the Ebbervale Company will assent to said arrangement, the said railroad company will require the delivery for use in building their railroad eight hundred tons of said iron:

Now, it is agreed between the parties hereto, that eight hundred tons of the railroad iron included in said contract with Joseph Finegan & Co. shall be delivered to the said railroad company as they may require it during the said period for actual use in building their said railroad, upon its being paid for in the promissory notes of said company, payable with interest, in the city of New York or London, at the option of Vose, Livingston & Co., in nine months from this date, and upon said company's delivery to Vose, Livingston & Co. the necessary irrevocable order enabling them to obtain when issuable the first mortgage bonds of said company guaranteed by the internal improvement fund of Florida to the amount which, under the said contract with Joseph Finegan & Co., the said Vose, Livingston & Co. were to receive as collateral security for the notes which, under that contract, were to have been given for said eight hundred tons of iron (such bonds to be held by the said Ebbervale Company and Vose, Livingston & Co. as collateral security for said railroad company's notes, with power to sell the same at public or private sale upon default in paying said notes or either of them), and also upon the said railroad company's delivering to the said Ebbervale Company and Vose, Livingston & Co. the guarantee of Edward N. Dickerson and of D. L. Yulee that the said bonds to be delivered to them (the Ebbervale Company and Vose, Livingston & Co.) shall
48 be those first issuable by said company under the guarantee of the internal improvement fund of Florida, on account of the purchase of railroad iron for said road, and that they shall be delivered as soon as they shall be issuable, and at all events before the maturity of said notes, and if not delivered within that time, that said Edward N.

Dickerson and D. L. Yulee shall be personally responsible for the payment of said notes as the guarantors thereof.

Dated October 19, 1858.

D. L. YULEE,
Pres't, etc., R. R.

I, Edward N. Dickerson, of the city of New York, assignee of Joseph Finegan & Co., do hereby assent to the aforegoing instrument, and do consent and agree that the making of the same by the Ebbervale Company and Vose, Livingston & Co. shall be without prejudice to the existing contract which was entered into between Joseph Finegan & Co. and Vose, Livingston & Co., and that the delivery of said eight hundred tons of iron to the said railroad company shall be deemed a part performance of the contract in like manner as if the same had been delivered to me or said J. F. & Co., except that I as such assignee am not, nor are they, to be responsible for the price of that eight hundred tons.

EDW'D N. DICKERSON.

EXHIBIT E.

NOVEMBER 1, 1858.

It is agreed between the Florida Railroad Company of one part, and Vose, Livingston & Co. of the other part, that the latter will deliver to the former five hundred and seventeen tons eight hundred weight and two quarters of railroad iron now at Fernandina, in Florida, in exchange for an equal amount of railroad iron belonging to the said
49 company now in Brooklyn City; and that if the Ebbervale Company shall concur in the conditional arrangement recently made to accept the said railroad company as contractors for the purchase of a quantity of railroad iron in place of J. Finegan & Co., who originally contracted for such purchase, as such arrangement is set forth in an instrument upon which is written the initials of M'r D. L. Yulee, and of Vose, Livingston & Co., and which only awaits the consent of the Ebbervale Company to be executed by the parties hereto, then the Florida Railroad Company will accept the said five hundred tons eight hundred weight and two quarters of railroad iron now in Brooklyn City as part of that to be delivered under the said contract, and will accept it at Brooklyn or New York City as if it were at Fernandina, and will pay all expenses which may have accrued upon it for storage or otherwise from this date.

New York, October 19, 1858.

VOSE, LIVINGSTON & CO.
EDW'D N. DICKERSON,
V. Pres. Fl'a R. R. Co.

I do hereby agree that the delivery to the Florida Railroad Company of the iron at Fernandina, in place of that in Brooklyn, as set forth in the aforegoing instrument, shall not prejudice in any way the contract between Vose, Livingston & Co. and J. Finegan & Co. for the purchase by the latter of a quantity of railroad iron for use in building the Florida Railroad, the said iron at Fernandina having been with my consent disposed of to the Florida Railroad Company under the arrangement set forth in the preceding document.

EDW'D N. DICKERSON,
Assignee, etc.

50 EXHIBIT F.

NOVEMBER 1, 1869.

NEW YORK, *October* 21, 1858.

Messrs. VOSE, LIVINGSTON & Co.:

GENTS: A conditional contract having been made with the Ebbervale Company and yourselves for the delivery of certain iron to the Florida Railroad Company, the Florida Railroad Company now consents to make absolute that contract with you, whether the Ebbervale Company accept its terms or not, you deciding your election within thirty days of this date.

E. N. DICKERSON,
V. Pres. Fla R. R. Co.

EXHIBIT G.

Memorandum of agreement made this thirty-first day of October, one thousand eight hundred and fifty-eight, between the Florida Railroad Company of the first part, and Vose, Livingston & Co., of New York, and the Ebbervale Company, of London, England, of the second part.

Whereas, heretofore, and on the 22d of November, 1856, Vose, Livingston & Co., acting in their own behalf and in that of the Ebbervale Company, entered into a contract with Joseph Finegan & Co., contractors for building the Florida Railroad, for the sale to them of two thousand tons of railroad iron, a copy of which contract is hereunto annexed and marked "A," and subsequently the said contract was extended so as to include altogether eight thousand tons of said railroad iron at the price of fifty-seven $\frac{50}{100}$ dollars per ton for the whole quantity, as
51 will more fully appear from the letters between Vose, Livingston & Co. and Joseph Finegan & Co. making such extension and modifying such contract, a copy of which is hereunto annexed and marked "B."

And whereas the parties of the second part are interested in the iron agreed by said contract to be sold, in the proportions of 2,300 tons by Vose, Livingston & Co., and of 5,700 tons by the Ebbervale Company.

And whereas portions of the said iron have been delivered, and other portions thereof are at Fernandina in bond ready for delivery under the said contract, but Joseph Finegan & Co. have discontinued their work upon the said railroad, and have assigned their said contract to Edward N. Dickerson, of the city of New York, and the said railroad company, proposing to proceed by themselves with the building of said railroad, have undertaken to assume the said contract and to execute and perform the same as herein modified in place of the said Joseph Finegan & Co.

Now, in consideration of the premises and of one dollar paid by each of the parties to the other, it is agreed by and between them as follows:

And first, the parties of the first part do agree on their part,

1. That they will and they hereby do assume the contract and all the agreements of Finegan & Co. contained in the papers, copies of which marked A and B are hereunto annexed, and that they will perform and fulfil the same in the place of the said Joseph Finegan & Co., as the same are modified by this instrument.

2. For the amount due for principal and interest upon the notes of Joseph Finegan & Co. now held by the parties of the second part, the promissory notes of the parties of the first part are to be given. The

latter notes are to be made payable in the city of New York or London, at the option of the parties of the second part, nine months from
52 this date, and are to bear interest at the rate of seven per cent. per annum, and are to be delivered immediately, and such of them as shall be given in place of the notes of Joseph Finegan & Co., which are endorsed by D. L. Yulee, shall also be endorsed by him. The collateral securities now held by the parties of the second part for the payment of the notes of Joseph Finegan & Co. shall be held by them as collateral security for the payment of said notes to be given by the parties of the first part, in the same manner and with the like effect as if such collateral securities had been originally deposited to secure the payment of the latter notes, and upon default in the payment of such notes the parties of the second part may sell such securities in their discretion, as provided in said paper A, and apply the proceeds upon such notes.

3. For the iron now at Fernandina and not actually delivered to Joseph Finegan & Co. the parties of the first part shall give their promissory notes payable in the city of New York or London, at the option of the parties of the second part, at nine months from this date, if payable in the city of New York, and at nine months and fifteen days from date if payable in London, which notes are to be delivered immediately, and are to include interest at seven per cent. per annum upon the contract price of said iron from the date of its shipment to the maturity of said notes, and such of them as may be for any portion of the 2,000 tons of iron for which the individual endorsements of D. L. Yulee were to be given shall be endorsed by him.

4. For the portion of said iron not yet shipped from Europe the parties of the first part are to give their promissory notes payable in the city of New York or London, at the other parties' option, payable in twelve months from the date of its shipment, which notes are to be delivered immediately, upon notice to the parties of the first part of the receipt by the parties of the second part of the bills of lading for such portion of said iron, and are to include interest to the maturity of said notes upon the contract price of that portion of such iron from
53 the date of the shipment of that parcel of said iron now at Fernandina, which was last shipped from Europe.

5. The possession of none of the iron now at Fernandina, and of none of that hereafter to be shipped from Europe, shall be claimed by the parties of the first part (notwithstanding the giving of said notes) until and as it shall be actually needed to lay upon said railroad. In the mean time it shall remain in the possession and control of the parties of the second part, and they shall have a lien upon it for the amount of said notes; and except upon the actual delivery to the parties of the second part of the bonds to be deposited with them as collateral security for the payment of said notes, the quantity of iron delivered by them shall not under any circumstances exceed one thousand tons at any time.

6. All of the notes to be given by the parties of the first part, as aforesaid, shall be secured by a deposit of the first-mortgage bonds of The Florida Railroad Company to the amount provided in article 5 of the annexed paper. And the parties of the second part shall have a right at any time to take the said bonds, or any part of them, at the rate at which they shall be deposited in payment of an amount of said notes equal to the value of said bonds at that rate, namely at the rate of eighty thousand dollars of bonds for each thousand tons of iron.

Provided that the parties of the first part shall not, within thirty-six

hours after notice as hereinafter mentioned, redeem such bonds by taking up the notes for which they shall be held as security. Such notice is to be in writing, and is to be left at the office of Edward N. Dickerson, in the city of New York, if he have an office therein, and if not, it is to be deposited in the post-office in the city of New York, in an envelope directed to said Dickerson, at said city.

The thirty-six hours shall run from the time such notice shall
54 be left or deposited as aforesaid. In case of default in the payment of said notes, or either of them, the parties of the second part may sell either at public or private sale, in their discretion, a sufficient amount of said bonds to pay from their proceeds the note or notes in the payment of which default shall have been made.

7. The parties of the first part shall commence laying their railroad track within one month from this date, and shall continue the same diligently and uninterruptedly until their railroad shall be finished. If they do not do so, or if they should at any time suspend the work upon their railroad, then the parties of the second part may rescind this contract on their part so far as it shall remain unexecuted, and may immediately sell such of the said iron and securities as remain in their possession, in such way and at such place as they may consider best, and apply their net proceeds upon such of the said notes as shall then be unpaid, and shall have a claim against the parties of the first part for the balance of said notes, and for the difference between the contract price of the iron remaining undelivered and the proceeds of said iron, the amount of which claim shall be paid upon demand by the parties of the first part.

And the said parties of the second part do on their part agree:

1. That Edward N. Dickerson, assignee of Joseph Finegan & Co., consenting to the said contract contained in the papers, copies of which are hereunto annexed, marked A and B, may be transferred to and assumed by the parties of the first part, and that they fulfilling the said contract as modified by this instrument, on their part, everything remaining to be done or performed by the parties of the second part, under the said contract, as altered and modified by this instrument, shall be done and performed by them to and with the parties of the first part, and that that portion of the said iron not already shipped from Europe shall be shipped as soon as practicable, after notice from the parties of the first part of their desire that it be shipped.

55 In witness whereof, the said Florida Railroad Company have caused their corporate seal to be hereunto affixed, and these presents to be signed by their president, and the other parties have hereunto subscribed their names the day and year first above written.

[L. S.] D. L. YULEE,
President Florida Railroad Company.

V., L. & Co. Attest:
GEORGE R. FOSTER, *Act'g Sec'y.*

STATE OF FLORIDA:

Transcript of the record of the proceedings of the board of trustees of the Internal Improvement Fund of the State of Florida, in the matter of the sale of the Florida Railroad, and copies of the papers and documents connected with said sale, and referred to in said proceedings.

At a session of the board of trustees of the Internal Improvement Fund of the State of Florida, held at Tallahassee, on the 6th day of October, A. D. 1866; present, David S. Walker, governor, John Beard,

comptroller, Charles H. Austin, treasurer, John B. Galbraith, attorney-general, and Hugh A. Corley, register of public lands.

The Hon. David L. Yulee, president of the Florida Railroad Company, made a statement to the board relative to the condition of the Florida Railroad.

M'r Galbraith offered the following resolution:

Resolved, That the Florida Railroad Company having failed to provide the sinking fund of one per cent. per annum on their bonds, as provided by "An act to provide for and encourage a liberal system of internal improvements in this State," the board will, according to the
56 provisions of the third section of the said act, proceed to take possession of said road; that the same shall be advertised for sale at auction at the office of said company in Gainesville, to be had on Thursday, the 1st day of November, A. D. 1866; and that the president of this board do attend to the necessary measures in order to carry out the objects of this resolution.

Upon the adoption of said resolution, the vote was—Yeas: Governor Walker, Mess'rs Beard, Austin, Galbraith, and Corley—5. Nays: None.

So the resolution was adopted.

At a session of said board, held at Tallahassee, on the 3d day of November, 1866.

Present, David S. Walker, governor, John Beard, comptroller, Charles H. Austin, treasurer, John B. Galbraith, attorney-general, and Hugh A. Corley, register of public lands.

M'r Hugh A. Corley, salesman of the board, made the following

Report:

TALLAHASSEE, FLORIDA,
November 1, 1866.

To the board of trustees of the internal-improvement fund:

GENTLEMEN: By a resolution adopted by the board of trustees on the 6th ultimo, the board took possession of the Florida Railroad, and ordered that said road, with the iron, equipments, work-shops, depots, and franchise thereof be sold to the highest bidder on the 1st day of November, 1866.

57 As disrected by the board and the president thereof, public notice of said sale was given by advertisement in the Floridian and the Sentinel, published in Tallahassee, the News and Herald, published in Savanah, and in the New York Journal of Commerce.

Under direction of the board, and in compliance with said resolution, I proceeded to Gainesville, Florida, for the purpose of offering said road for sale at the office of the Florida Railroad Company.

I then announced that I would proceed to sell said road upon the following conditions and stipulations:

"This sale shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent. semi-annually to the sinking-fund, until all the outstanding bonds are discharged, under the penalty of an amendment of the contract of purchase and the forfeiture of the purchase-money paid in.

"It shall be further stipulated that the iron and locomotives now upon and belonging to said road shall remain upon the same, and not be removed therefrom;" and that the purchasers will, within a reasonable time, repair and complete said road in a proper condition to be run and operated according to the original intention and design of said road.

"And said sale is subject to all the conditions of the act before referred to (act of January 6th, 1855).

"Terms cash—one-half to be paid immediately on the close of the sale; the other half on the delivery of the title deeds."

Whereupon several claims and notices were presented, copies of which are hereto annexed.

One from the Brunswick and Albany Railroad Company, claiming two miles of railroad iron and the engine "Alapaha."

58 One from the Rogers Locomotive and Machine Works, claiming the locomotives Alahua and Marion.

One from Danforth, Cook & Co., claiming the locomotive Fernandina.

One from M'r F. Vose, claiming as a bondholder and creditor of the Florida Railroad Company the right to contest the legality of the sale, and that the purchase of the road will be subject to the first-mortgage lien for the principal and interest of the bonds held by him.

Also an irregular and illegal writ of injunction issued by the clerk of Alachua circuit court, at the instance of Charles P. Cooper, esq., enjoining the sale.

I thereupon offered for sale to the highest bidder the road-bed, iron, equipments, work-shops, depots, and franchise, and all the property of whatsoever kind of the Florida Railroad Company, and M'r Isaac K. Roberts having bid the sum of three hundred and twenty-three thousand four hundred dollars ($323,400), and that being the highest and best price bid, said bid was accepted, and the property mentioned was sold to the said Isaac K. Roberts upon the conditions and stipulations above-mentioned.

All of which is respectfully submitted.

HUGH A. CORLEY,
Salesman Board of Trustees, I. I. Fund.

Copies of notices.

Notice to whom it may concern:

Please to take notice that, among the property advertised to be sold of the Fernandina and Cedar Keys or Florida Railroad Company, on the first day of November next, there are two (2) miles and upward

59 of railroad iron, and also a locomotive engine, now or heretofore known as the Alapaha, which are the property of the Brunswick and Albany Railroad Company of Georgia (formerly known as the Brunswick and Florida Railroad Company).

And notice is hereby given that the Brunswick and Albany Railroad Company will hold responsible in damages all parties engaged in the sale or purchase of said property.

Office of the Brunswick and Albany R. R. Co., Brunswick, Ga., October 23, 1866.

(Signed) H. G. WHEELER,
President B. & A. R. R. Co.

The Rogers Locomotive and Machine Works protest against the sale of the locomotives Alahua and Marion, as they claim the title to them.

Danforth, Cook & Co. protest against the sale of two locomotives, one named Fernandina, and one out of repair, as they claim the title to them.

I give notice for M'r F. Vose, that, as a creditor and bondholder of

the Florida Railroad Company, he claims the right to contest the legality of the sale of its road and property advertised for to-day, and that any purchase of the same is and will continue hereafter to be subject to the first-mortgage lien for the principal and interest of the bonds held by him, or subject to any right of removal, taking back, or other legal proceedings by said Vose, or other sellers of the iron upon the road by reason of non-payment of the same.

Gainesville, Nov. 1, 1866.

(Signed) J. MORROW,
Pl'ff's Att'y.

60 STATE OF FLORIDA,
Alachua County:

CHARLES P. COOPER
vs.
THE FLORIDA RAILROAD COMPANY.

To the sheriff of said county or other officers:

You are hereby commanded to enjoin and restrain the president and directors of the Florida Railroad Company, and all their officers and agents, and also the board of internal improvements of the State of Florida, and each of them, and their officers and agents, from selling the Florida Railroad, or any portion of the franchise of said railroad, unless the said company, its president or directors, or the board of internal improvements, shall first pay, or secure to be paid, Charles P. Cooper, attorney at law, the sum of six hundred and fifty dollars, with interest thereon.

Witness my hand and the seal of the circuit court for Alachua County this 31st day of October, A. D. 1866.

(Signed) S. P. BEVILL, *Clerk.*

The board of trustees ratified said sale, and M'r Isaac K. Roberts, the purchaser of said Florida Railroad, being present, requested that said property should be conveyed to Edward N. Dickerson, of New York, and his associates.

61 John B. Galbraith, esq., having prepared a deed conveying to Edward N. Dickerson and his associates the Florida Railroad and all its property of any kind, said deed was read and approved, and the trustees thereupon, the purchase-money having been paid, signed, sealed, and delivered the deed to the purchaser.

Copy of deed.

This indenture, made and entered into this third day of November, in the year of our Lord one thousand eight hundred and sixty-six, at the city of Tallahassee, in the State of Florida, between David S. Walker, governor of the State of Florida; John Beard, comptroller; Charles H. Austin, treasurer; Hugh A. Corley, register of public lands; and John B. Galbraith, attorney-general of the State of Florida, constituting ex officio the board of trustees of the internal-improvement fund of the State of Florida, under and by virtue of "An act to provide for and encourage a liberal system of internal improvements in this State," approved the sixth day of January, 1855, of the one part, and Edward N. Dickerson and his associates of the other part:

Whereas the Florida Railroad Company, a body corporate, created

by an act of the general assembly of Florida, approved the 8th of January, 1853, entitled "An act to incorporate a company to construct a railroad across the peninsula of Florida under the style of the Florida Railroad Company," did, on the sixth day of March, 1855, notify the trustees of the internal-improvement fund of their full acceptance of the provisions of said act to provide for and encourage a liberal system of internal improvements in this State;

And whereas the third section of said act provides that "all bonds issued by any railroad company under the provisions of this act shall be a first lien or mortgage on the road-bed, iron, equipments,
62 workshops, depots, and franchise; and upon a failure on the part of any railroad company accepting the provisions of this act to provide the interest as herein provided on the bonds issued by said company, and the sum of one per cent. per annum as a sinking fund, as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder, either for cash, or additional approved security, as they may think most advantageous for the interests of the internal-improvement fund and the bondholders. The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking fund: Provided, That, in making such sale, it shall be conditioned that the purchaser shall be bound to continue the payment of one-half of one per cent. semi-annually to the sinking fund until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase and the forfeiture of the purchase-money paid in";

And whereas the said Florida Railroad Company, having entirely failed, since the fifth day of November, 1863, to pay the one-half of one per cent. semi-annually on the bonds issued by said company, according to the provisions of the second section of said act, to provide for and encourage a liberal system of internal improvements in this State, and also the interest on the same;

And whereas, according to the provisions of the third section of said act, the said trustees of the internal-improvement fund did, on the sixth day of October, 1866, take into their possession the said Florida Railroad and all its property of every kind, and advertise the same for sale for cash at public auction, at the town of Gainesville, Florida, on the first day of November, 1866;

63 And whereas, on the day and at the place last mentioned, the terms of sale being announced, "that the purchasers shall be bound to continue the payment of one-half of one per cent. semi-annually to the sinking fund until all the oustanding bonds are discharged, under the penalty of an annulment of the contract of purchase and the forfeiture of the purchase-money paid in," and "that the iron and locomotives now upon and belonging to said road should remain upon the same and not be removed therefrom, and that the purchasers will, within a reasonable time, repair and complete said road in a proper condition to be run and operated according to the original intention and design of said road," and that said sale was subject to all the conditions of the act to provide for and encourage a liberal system of internal improvements in this State, and the said Florida Railroad and all its property of every kind having been then and there exposed and put up for sale, was purchased by Isaac K. Roberts, he being the highest and best bidder,

having bid the sum of three hundred and twenty-three thousand four hundred dollars for the same;

And whereas the said Isaac K. Roberts has directed that the Florida Railroad and all its property of every kind shall be conveyed to the said Edward N. Dickerson and his associates:

Now, therefore, this indenture witnesseth, That the said trustees of the internal-improvement fund, for and in consideration of the premises, as also of the said sum of three hundred and twenty-three thousand four hundred dollars to them in hand paid by the said parties of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, and confirmed, and do by these presents grant, bargain, sell, alien, deliver, and confirm with the said parties of the second part, the said Florida Railroad, its iron, equipments, workshops, depots, and franchises, and all its property of every kind;

64 To have and to hold the aforegranted premises, with all the rights, privileges, and appurtenances to the same appertaining or belonging, to the said parties of the second part, their successors and assigns, in as full and ample a manner as the said trustees of the internal-improvement fund can convey the same, subject, however, to the conditions and provisions stated and made known at said sale as above set forth. And the said trustees of the internal-improvement fund will, from time to time, and at all times hereafter, upon the reasonable request of the said parties of the second part, their successors or assigns, make and execute all such further deeds necessary for the perfect and absolute assurance and confirmation of the said railroad and other property hereby conveyed, or intended so to be, unto the said parties of the second part, their successors and assigns, as by them shall be reasonably required.

In testimony whereof the said trustees of the internal-improvement fund of the State of Florida have hereunto set their hands and seals this third day of November, 1866.

[L. S.]	(Signed)	DAVID S. WALKER, *Governor.*
[L. S.]		JOHN BEARD, *Comptroller.*
[L. S.]		C. H. AUSTIN, *Treasurer.*
[L. S.]		HUGH A. CORLEY, *Register Pub. L'ds.*
[L. S.]		JOHN B. GALBRAITH, *Attorney-Gen'l.*

Signed, sealed, and delivered in the presence of us.
EDWARD M. WEST.
WILLIAM H. PARTRIDGE.

At a session of the board of trustees of the internal-improvement fund, held at Tallahassee on the 7th day of November, 1866,

65 Present, David S. Walker, governor; John Beard, comptroller; Charles H. Austin, treasurer; John B. Galbraith, attorney-general, and Hugh A. Corley, register of public lands;

Governor Walker offered the following resolution:

Resolved, That the ninety-seven thousand eight hundred dollars in hand, arising from the sale of the Florida Railroad, be deposited on call in the City Bank of New York, and that M'r Moses Taylor be appointed confidential agent of this board, for the purpose of taking up the first-mortgage bonds of the Florida Railroad Company, with instructions to

purchase the same, including the past due coupons, at not more than twenty per cent. upon the principal of said bonds.

Upon the question of adopting said resolution the vote was:

Yeas: Gov. Walker, Mess'rs Beard, Galbraith, and Corley—4. Nay: M'r Austin—1.

So the resolution was adopted.

At a session of the board of trustees of the internal improvement fund, held at Tallahassee on the first day of June, 1867,

Present, David S. Walker, governor; John Beard, comptroller; John B. Galbraith, attorney-general, and Hugh A. Corley, register of public lands,

M'r Corley offered the following resolution:

Be it resolved by the board of trustees of the internal improvement fund of Florida, That so much of the moneys placed in the hands of M'r Moses Taylor, president of the City Bank of New York, for
66 the purpose of purchasing the first-mortgage bonds of the Florida Railroad Company, by resolution adopted by this board on the 7th of November last, as shall not be applied to the purchase of said bonds prior to the first day of August next, shall be invested as a sinking fund, to provide for the ultimate payment of the outstanding bonds of said company in the class of securities mentioned in "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6th, 1855.

Upon the adoption of said resolution the vote was:

Yeas: Gov. Walker, Mess'rs Beard, Galbraith, and Corley—4. Nays: None.

So the resolution was adopted.

STATE OF FLORIDA:

I, David S. Walker, president of the board of trustees of the internal improvement fund of the State of Florida, do hereby certify that the foregoing pages is a true transcript of the record and proceedings of said board of trustees in relation to the sale of the Florida Railroad, and the disposition of the funds or moneys arising or derived therefrom.

Witness my hand this seventh day of September, A. D. 1867.

(Signed) DAVID S. WALKER,
President Board of Trustees I. I. Fund.

Attest:

(Signed) HUGH A. CORLEY,
Secretary of State.

[U. S. rev. stamp, 5 cents, canceled]

67 STATE OF FLORIDA:

I, Benjamin F. Allen, secretary of state of the State of Florida, do hereby certify that David S. Walker, whose proper signature is subscribed to the instrument of writing hereto annexed, is, and was at the time of signing the same, governor of the State of Florida, duly commissioned as such, and president of the board of trustees of the internal improvement fund of the State of Florida, and that Hugh A. Corley, whose signature is subscribed to said instrument, is secretary of said board of trustees.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Florida.

Done at the capitol this 10th of September, A. D. 1867.

[SEAL.] (Signed) BENJ. F. ALLEN,
Secretary of State.

68 *Answer of defendant Yulee.*

New York supreme court.

The Florida Railroad Company, Edward N. Dickerson, David L. Yulee, Marshall O. Roberts, and Isaac K. Roberts.

The defendant, David L. Yulee, for answer to the complaint herein, says—

First. This defendant admits the allegations of the said complaint, that the said Florida Railroad Company was a corporation chartered by the State of Florida, and that the said company accepted the conditions of the law of that State entitled "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6th, 1855, and by such acceptance became entitled to the privileges and subject to the conditions of said act; that the said Florida Railroad Company contracted an obligation with the said Vose, Livingston & Co., under a contract dated October 31st, 1858, and issued to them the notes as alleged, accompanied with a large collateral deposit; that the notes issued by the said Florida Railroad Company to Vose, Livingston & Co. under said contract were only partially paid, and for the most part were unpaid; and that, owing to the intervention of war, the company remained unable to pay them, and having been bankrupted by the consequences of said war, were unable to pay afterward; that the said complainant sued the said Florida Railroad Company in a court of
69 this State, and recovered a judgment, under which he became possessed of the whole amount of the collateral security (though, in the opinion of this defendant, illegally), and in addition thereto obtained a judgment and order for execution for a large amount, which is still in force, and which is for the same demand now sued upon that by virtue of one of the provisions of the above referred to law of Florida, and of which provision the said complainant was well aware when he entered into the said contract.

The franchise of the said railroad company was resumed by the State, and, together with the said railroad and all its property of every kind whatsoever, was sold and assigned at public auction to the highest bidder; whereupon the said Florida Railroad ceased by operation of law to possess any corporate franchise, and was thereby and thereupon dissolved and extinguished.

Second. And this defendant, further answering the complaint of said complainant, admits that he was the president of the Florida Railroad Company at the date of the contract referred to, and that he signed all of said notes as such president; but this defendant declares to be wholly untrue all that part of complainant's complaint which alleges that he and his associates were in any manner misled into making a contract which they would not otherwise have done, as is abundantly proven by others of the allegations of said complainant, wherein he shows that they were fully aware that Edward N. Dickerson was the assignee, under Joseph Finegan & Co., of their contract with the said Vose, Livingston & Co., and repeatedly dealt with him as such, and that their negotiations for the transfer of said contract to the Florida Railroad Company were made with the said Edward N. Dickerson, knowing him to be such assignee, and not with this defendant. And in further disproof of the charge unjustly made by the complainant, this defendant avers that, as early as the month of March, 1858, the commercial house of the complainant had agreed with Joseph Finegan & Co. to transfer to the

70 Florida Railroad Company the contract with them, and had communicated with this defendant upon the subject, and obtained his consent thereto in behalf of the railroad company, and the execution of the formal papers of transfer had only been suspended in consequence of a technical difficulty suggested by the counsel of the said Vose, Livingston & Co.; and that pending this transaction the contract of Joseph Finegan & Co. with the said Vose, Livingston & Co. was transferred and assigned to Edward N. Dickerson; and afterward, the said Edward N. Dickerson being chosen vice-president of the Florida Railroad Company, and specially authorized to take charge of the purchase of all iron and other material, with full power to make and execute any contract required for the same, he, the said Edward N. Dickerson, in the double character of assignee of Joseph Finegan & Co. and vice-president and agent of the Florida Railroad Company, proceeded, as understood by this defendant, to perfect the same arrangement with Vose, Livingston & Co. previously begun and agreed upon by them with Joseph Finegan & Co. with the sanction of the Florida Railroad Company, through this defendant as president thereof, and this defendant did no more than execute the deed of transfer in behalf of the Florida Railroad Company by the special authority and instruction of the said company, which special authority was obtained, as this defendant understood at the time, by the request and for the full and better assurance and satisfaction of the said Vose, Livingston & Co.

Th[illegible]d. And this defendant further says that he could have had no possible interest to practice any deception or concealment with the said Vose, Livingston & Co., as falsely charged by the complainant, because he had no pecuniary interest whatever in any of the transactions beyond his ordinary relation to the company as a stockholder and officer, and in common with other stockholders; and as his obligation as an endorser, whatever that might be, was to remain unaltered by the new contract between Vose, Livingston & Co. and the Florida Railroad Company. Besides which, the transfer of the iron contract to the

71 Florida Railroad Company was in full harmony with all the antecedents of the transaction; for at the time of the original contract between Joseph Finegan & Co. and Vose, Livingston & Co., it was known to this defendant that the transaction was based upon confidence in the value of the bonds to be deposited with the notes, and not upon the personal responsibility of the contractors, and as there had been difficulty and delay in procuring and depositing the bonds, a transfer to the company rendered the delivery of the bonds more certain, and was therefore a preferable arrangement to them, the said Vose, Livingston & Co.; and recognizing this view of their interest, the said Vose, Livingston & Co. had agreed, with Joseph Finegan & Co., to do the same thing, which was afterward carried into effect by agreement between Edward N. Dickerson and themselves. And the transaction was also in harmony with the views of the Florida Railroad Company, as shown by a resolution of the board of directors of said company, adopted on the 7th day of May, 1858, before the assignment of the contract of Joseph Finegan & Co. to Edward N. Dickerson, which contemplated arrangements of this nature, and provided "that the president of the company be authorized to assume any liabilities of the said Joseph Finegan & Co. which the parties holding the same may be willing to transfer to the Florida Railroad Company, securing at the same time a fair and proper amount of the bonds of this company to indemnify it against loss or damage from such assumption.

Fourth. And this defendant further answers, that no bonds or other

securities were deposited with him or with the Florida Railroad Company by Edward N. Dickerson on account of the Vose, Livingston & Co.'s contract for iron, the bonds provided to be deposited with Vose, Livingston & Co. under the contract at the rate of $8,000 per mile, which was the whole issue authorized for iron, being deemed an ample provision in behalf of the company and for security of all concerned, and would have proven to be so but for the untoward and unanticipated occurrence of war and its consequences.

72 Fifth. And this defendant further says, that the sale ordered by the trustees of the internal improvement fund of the State of Florida was in strict pursuance of law; that in making the sale they were discharging a duty enjoined by law; that the inevitable and unavoidable sale of the road under the law was made known to the bondholders of the company at a meeting in the city of New York on the 10th day of September, 1866, at which this complainant was present by his representative, M'r Southmayd; and the said bondholders to whom this defendant had exhibited a complete statement of the condition of the road and of the affairs of the company (and among other things the amount of arrears to the sinking fund) were urged to take steps to assume the proprietorship of the road, and restore it to a condition for use. But the complainant, together with a majority of his cobondholders, refused do to anything to save the road from forfeiture and sale, and from passing out of their control and ownership.

(A copy of these proceedings, as officially verified at the time, is hereto appended.)

Sixth. And this defendant further says, that the complainant was present in Tallahassee, and in communication with the trustees of the internal improvement fund, before the date of the sale; and if he deemed such sale illegal or injurious for any cause, could have proceeded in the courts of the State by whatever proceeding (of injunction or otherwise) was necessary and adequate to arrest the sale and protect his interest. And further, that the said complainant was also present at the sale, and could have protected his interest by purchasing the property or by uniting with the purchasers in their bid, opportunity to do which this defendant knows had been offered to him in the city of New York, and afterward, he believes, again in the State of Florida.

Seventh. And this defendant denies that the number of shares held by him at the date of the seizure of the road by the trustees of
73 the internal improvement fund is correctly stated by the complainant, or that he was in arrears as a stockholder; but, notwithstanding, contends that if he was so in arrears this complainant has no right to call upon him to account to him therefor.

Eighth. And this defendant further answers, that the contract with Vose, Livingston & Co. was fully and unconditionally assumed by the Florida Railroad Company, as is shown by the contract of October 31st, 1858, exhibited by the complainant with his complaint, and that there was no reservation or private understanding whereby the complainant to look elsewhere or beyond said company for the fulfillment of said contract and payment of the notes, and that upon the execution of said contract this defendant understood that the whole and only responsibility to the said Vose, Livingston & Co. thenceforward attached to the said Florida Railroad Company as the party in contract with them, and to none other, whatever might be the points to be adjusted concerning said assumption between the railroad company and the contractors as between themselves in the final adjustment of accounts.

Ninth. And this defendant answers further, that as to his alleged

liability as endorser of a part of the notes, it extended, if to any, to only a part of the debt claimed; that it was understood at the time of his endorsement that the bonds were the real reliance, and that his name was required only as a security for the good faith of the parties, and not as a basis upon which to charge him with the debt; that he signed them without any consideration, and without any interest in the contract; that the bonds acknowledged by said complainant to be held by him were mostly collateral with the notes upon which this defendant's name was endorsed; that said bonds were not to be sold without a previous notice specially agreed upon, and which has never been given; and that the said bonds and the coupons past due upon them can, in the opinion of this defendant, be made to realize the greater part if not all the debt claimed; that he was not a party to the proceedings under
74 which the said bonds were sold; and that the complainant by pursuing the course he adopted to obtain possession of the bonds in a manner contrary to the terms of the contract under which this defendant was induced to sign his name as endorser, and without notice to this defendant, and in disregard of his reasonable rights and interests, virtually waived and discharged all claim against this defendant on account of the debts of the Florida Railroad Company, and should be so decreed by this court.

Wherefore, this defendant prays that the complaint as to him may be dismissed with costs.

W'M C. TRAPHAGEN,
Att'y for Def'ts.

CITY AND COUNTY OF NEW YORK, *ss:*

David L. Yulee, one of the defendants in the above-entitled action, being duly sworn, says that he has read the foregoing answer to the complaint herein, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

D. L. YULEE.

Sworn to before me, this 9th day of May, 1868.

MORTIMER SMITH,
Notary Public, New York.

At a meeting of the first mortgage bondholders of the Florida Railroad Company, held at the office of Foster & Thompson, New York City, September 10th, 1866,

Present:

The Ebbervale Company	holding	323	bonds.
Francis Vose (by M'r Southmayd, att'y)	"	197	"
Marshall O. Roberts	"	270	"
75 John Elliott (Riggs & Co)	holding	90	bonds.
Tho's Branch & Son	"	50	"
Wilmington Bank	"	84	"
James Thompson	"	100	"
Edward N. Dickerson	"	90	"
		1,204	"

M'r G. R. French, representing the Wilmington Bank, was called to the chair, and

A. L. Purvis was chosen secretary.

M'r Yulee represented to the meeting the present condition of the Florida Railroad, as follows:

1st-mortgage bonds	$1,617,000
Interest	679,000
Arrears due sinking fund	80,850
	$2,376,850
Freeland bonds	$1,447,000
Interest on same	753,000
Arrears due sinking fund	62,550
	$2,262,550
Floating debt	$345,000
Estimated interest	137,000
Unadjusted accounts with contracts	200,000
	$682,000
Total	$2,376,850
	2,262,350
	682,000
	$5,321,100

76 M'r Yulee proposed the following resolution:

Resolved that the first-mortgage bondholders of the Florida Railroad advance the necessary funds to place the railroad in working order and arrange for the purpose of acquiring title to the road by sale under the internal improvement act.

On the resolution the following vote was given:

In the affirmative—

M. O. Roberts	$270,000
E. N. Dickerson	90,000
	$360,000

In the negative—

The Ebbervale Company	$323,000
Riggs & Co	90,000
Wilmington Bank	84,000
James Thompson	100,000
Francis Vose	197,000
Thomas Branch & Son	50,000
	$844,000

The resolution was decided in the negative.

On motion, the meeting adjourned.

GEO. R. FRENCH,
Chairman.

A. L. PURVES,
Secretary.

77 *Notice of appeal.*

Supreme court.

CITY AND COUNTY OF NEW YORK:

FRANCIS VOSE
against
DAVID L. YULEE.

Take notice that the defendant above named appeals to the general term of this court from the judgment entered herein on the 13th day of June, 1873, against the said defendant, for one hundred and sixty-nine thousand four hundred and fifty-nine and thirty-two one hundredth dollars, ($169,459.32) and from every part thereof.

Dated New York, July 10, 1873.

Yours, etc.

WILLIAM C. TRAPHAGEN,
Defendant's Attorney.

To STRONG & SHEPARD,
Plaintiff's Attorney.

To the clerk of the county of New York.

(Endorsed:) Filed July 11, 1873.

78 At a special term of the supreme court of the State of New York, held at the court-house in the city of New York, on the 26th day of February, 1873.

Present, C. H. Van Brunt, J.

FRANCIS VOSE
against
DAVID L. YULEE (IMPLEADED, ETC.)

A motion being here duly made by the above-named defendant that this cause be removed to the circuit for trial as a jury cause—

After hearing counsel for the respective parties—

Ordered, that said motion be and it hereby is granted, and that this cause be and it hereby is transferred to the circuit of this court for trial as a jury cause; and the clerk is hereby directed to place this cause upon the circuit calendar for trial, according to its date of issue.

A copy.

CHARLES E. LOEW, *Clerk.*

79 Supreme court circuit.

FRANCIS VOSE
against
DAVID L. YULEE.

JUNE 9, 1873.

Present, Hon. G. C. Barrett, justice.

I hereby certify that this cause was this day tried by the court and a jury and a verdict rendered therein for the plaintiff for the sum of $168,589.58.

Enter judgment. Stay of execution 20 days. Paid $1.10.

CHARLES E. LOEW, *Clerk.*

80 Supreme court.

FRANCIS VOSE
against
DAVID L. YULEE.

Judgment, 13 June, 1873.

The complaint herein having been dismissed after trial at special term, as appears by the judgment-roll filed December 14th, 1869; and the plaintiff having appealed from such judgment to the general term of this court, where the same was affirmed, as appears by the judgment-roll filed February 25th, 1871; and the plaintiff having thereupon appealed therefrom to the court of appeals, where the said judgment was affirmed as to all the defendants except the defendant David L. Yulee, and as to him the same was reversed and a new trial granted, as appears by the remittitur and the order of this court thereon, filed December 7th, 1872; and the cause having thereafter been noticed for trial at special term as against said defendant, David L. Yulee; and an order having been made and entered herein at special term, on the motion of the said Yulee, dated February 26th, 1873, whereby it was ordered that a jury trial be had at circuit; and thereupon the issues herein having been tried on the 9th day of June, 1873, before

81 Hon. George C. Barrett, justice, and a jury and a verdict rendered for the plaintiff for the sum of $168,589.58 against said defendant, David L. Yulee:

Now, on motion of Strong & Shepard, attorneys for the plaintiff,

It is adjudged that Francis Vose, the plaintiff, recover of David L. Yulee, the defendant, one hundred and sixty-eight thousand five hundred and eighty-nine dollars and fifty-eight cents, the amount of said verdict, together with eight hundred and sixty-nine dollars and seventy-four cents costs and disbursements, amounting in all to the sum of one hundred and sixty-nine thousand four hundred and fifty-nine dollars and thirty-two cents.

(Endorsed:) Filed June 13, 1873, at 11h. 45m.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original judgment-roll on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

In witness whereof, I have hereunto subscribed my name, and affixed my official seal, this 23d day of September, 1873.

[SEAL.] CHARLES E. LOEW, *Clerk.*

82 At a general term of the supreme court of the State of New York, held in and for the first judicial department at the court-house in the city of New York, on the 10th day of May, 1875.

Present: honorable Noah Davis, presiding justice; John R. Brady, Charles Daniels, justices.

FRANCIS VOSE
ag'st
DAVID L. YULEE.

The appeal by the defendant from the judgment entered herein on the

13th day of June, 1873, coming duly on to be heard, and after hearing E. N. Dickerson, esq., of counsel for appellants, and Joseph H. Choate, esq., of counsel for respondents, now on motion of Theron G. Strong, attorney for respondent, it is ordered and adjudged, that the judgment entered herein on the 13th day of June, 1873, be and the same hereby is affirmed, with costs to the respondent.

A copy.

WM WALSH, *Clerk.*

(Indorsed:) N. Y. supreme court. Francis Vose ag'st David L. Yulee. Copy. Order. Theron G. Strong, pl'ff's att'y, 99 Nassau st., N. Y. Rec'd May 10. To Dickerson & Beaman, def't's att'y.

83 *Judgment, May 10th, 1875.*

Supreme court.

FRANCIS VOSE, RESPONDENT,
ag'st
DAVID L. YULEE, APPELLANT.

The defendant, David L. Yulee, having appealed from the judgment entered herein on the 13th day of June, 1873, against the said defendant for one hundred and sixty-nine thousand four hundred and fifty-nine $\frac{32}{100}$ dollars, and the said general term having, by an order, duly made and entered, ordered that said judgment be affirmed with costs to the respondent, and said costs having been duly taxed at the sum of $138\frac{65}{100}$ dollars, it is now, on motion of Theron G. Strong, attorney for respondent, ordered and adjudged, that said judgment be in all things affirmed, and that the respondent herein do recover of the appellant herein the sum of one hundred and thirty-eight $\frac{65}{100}$ dollars costs
84 of the appeal from said judgment, and that the respondent have execution therefor.

(Endorsed:) Filed May 10, 1875. 3h. p. m.

(Indorsed:) N. Y. supreme court. Francis Vose ag'st David L. Yulee. Judgment. Theron G. Strong, att'y for resp't, 99 Nassau st., N. Y. Rec'd May 10.

Please take notice that judgment, of which the within is a copy, was this day entered in the office of the clerk of the city and county of New York.

Dated New York, May 10, 1875.

THERON G. STRONG,
Att'y for Resp't.

To DICKERSON & BEAMAN, Esq'r's.
Att'ys for App'l't.

85 Supreme court.

COUNTY OF NEW YORK:

FRANCIS VOSE, PLAINTIFF, RESPONDENT,
against
DAVID L. YULEE, DEFENDANT, APPELLANT.

GENTLEMEN: Please take notice that the defendant appeals to the

court of appeals from the judgment of the general term of the supreme court in this action, entered on the 10th day of May, 1875, affirming the judgment entered herein on the 13th day of June, 1873.

Dated New York, May 17th, 1875.

Yours, &c.,

DICKERSON & BEAMAN,
Defendant's Att'ys.

To T. G. STRONG, Esq'r.
Plff's Att'y, and
To the clerk of the county of New York.

(Endorsed:) Filed May 17th, 1875.

86 STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal, and the judgment roll on file in my office.

In witness whereof I have hereunto set my hand, and affixed my official seal, this 18th day of May, A. D. 1875.

[SEAL.] W'M WALSH, *Clerk.*

86½ (Indorsed:) Court of appeals. Francis Vose, resp'd't, vs. D. L. Yulee, appellant. C'f'd copy. Judg't record and notice of appeal. Return. Dickerson & Beaman, app'l't's att'ys, Staats Zeitung b'l'd., New York City, N. Y. Filed March 24, 187 . Filed May 20, '75.

87 At a special term of the supreme court of the State of New York, held at the chambers thereof at the court-house in the city of New York, on the 24th day of March, 1876.

Present, Hon. Charles Donohue, justice.

FRANCIS VOSE, RESPONDENT, *ag't*
DAVID L. YULEE, APPELLANT.

The defendant, David L. Yulee, having appealed to the court of appeals from the judgment of the general term of this court, bearing date May 10th, 1875, and entered in the office of the clerk of the city and county of New York, on the 10th day of May, 1875, and the said court of appeals having ordered and adjudged that the judgment of the supreme court appealed from in this action be in all things affirmed, and that the respondent recover against the appellant costs of appeal to the said court of appeals:

Now on reading and filing the remittitur from the said court of appeals, and on motion of Theron G. Strong, attorney for respondent, it is ordered that the judgment of the court of appeals be, and the same hereby is, made the judgment of the supreme court, and that the judgment of the supreme court appealed from in this action be affirmed, and that the respondent recover against the appellant costs of appeal to the said court of appeals.

CHA'S DONOHUE.

(Indorsed:) N. Y. supreme court. Francis Vose ag'st David L. Yulee Order on remittitur. Theron G. Strong, pl'ff's att'y, 99 Nassau st., N. Y. Filed March 24, 1876.

83 CITY AND COUNTY OF NEW YORK:

Supreme court.

FRANCIS VOSE, RESPONDENT, } ag't
DAVID YULEE, APPELLANT. }

The defendant, David L. Yulee, having appealed to the court of appeals from the judgment of the general term of this court, bearing date May 10th, 1875, and entered in the office of the clerk of the city and county of New York on the 10th day of May, 1875, and the said court of appeals having ordered and adjudged that the judgment of the supreme court appealed from in this action be in all things affirmed, and that the respondent, Francis Vose, recover against the appellant, David L. Yulee, costs of appeal to the said court of appeals, and the remittitur from the said court of appeals having been filed and an order entered thereon whereby it was ordered that the judgment of the court of appeals be made the judgment of the supreme court and the respondent's costs of said appeal having been duly taxed at the sum of one hundred and twenty $\frac{02}{100}$ dollars:

Now, on motion of Theron G. Strong, attorney for respondent, it is ordered and adjudged that the judgment of the court of appeals
89 be, and the same hereby is, made the judgment of the supreme court; and that the judgment of the supreme court appealed from in this action be affirmed, and that the respondent, Francis Vose, recover against the appellant, David L. Yulee, the sum of one hundred and twenty $\frac{02}{100}$ dollars, being the respondent's costs as taxed; and that the respondent have execution therefor.

(Indorsed:) N. Y. supreme court. Francis Vose ag't David L. Yulee. Judgment roll. Theron G. Strong, pl'ff's att'ys. Filed March 27th, 1876. 10 h. 18 m.

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, and also in the rendition of the final judgment or decree of a plea in a suit which is in the said court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the
91 said suit between Francis Vose, as plaintiff, and David L. Yulee, as defendant, wherein a right, privilege, or immunity was claimed under a statute of the United States, and the decision was against the right, privilege, or immunity specially set up or claimed under such statute, a manifest error hath happened to the great damage of the said David L. Yulee, as by his complaint in that behalf appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme
92 Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the 25th day of April, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the U. S.
For the Southern District of New York.

The foregoing writ is hereby allowed.

ALEXANDER S. JOHNSON,
Judge U. S. Circuit Court Southern District of New York.

92½ (Indorsed:) Supreme Court of the United States. David L. Yulee, plaintiff in error, against Francis Vose, defendant in error. Writ of error on appeal from the court of appeals of the State of New York. Dickerson & Beaman, att'ys for pl'ff in error, Staats Zeitung building, New York City.

93 UNITED STATES OF AMERICA, *ss:*

To Francis Vose, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals for the State of New York, wherein David L. Yulee is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this second Monday of October, in the year of our Lord one thousand eight hundred and seventy-five.

S. E. CHURCH,
Chief Judge of the Court of Appeals of the State of New York.

94 STATE OF NEW YORK,
City & Co. of New York, ss:

John McCrone, being duly sworn, says that at No. 99 Nassau st., in the city of New York, on Saturday, May 27th, 1876, he personally served the above citation upon T. G. Strong, the attorney of Francis Vose, the said defendant in error, by delivering to and leaving with said Strong a true copy thereof, and at the same time exhibiting to him the original of said citation, and deponent knew the person so served to be the said attorney of said defendant in error.

JOHN McCRONE.

ARTHUR BERRY,
Notary Public, New York & Kings Co.

(Indorsed:) Supreme Court of the United States. David L. Yulee, plaintiff in error, against Francis Vose, defendant in error. Citation. Dickerson & Beaman, attorneys for pl'ff in error, Staats Zeitung building, New York City.

I admit service of a copy of within, dated May 27, 1876.

THERON G. STRONG,
Att'y for Def't in Error.

95 STATE OF NEW YORK:

Court of appeals.

CLERK'S OFFICE, *Albany*, , 187 .

I, Edwin O. Perrin, clerk of the court of appeals of the State of New York, do hereby certify that the foregoing consists of the original return made to this court with the judgment of this court thereupon, together with the original writ of error and citation to the Supreme Court of the United States.

In witness whereof I have hereunto set my hand and affixed my official seal this 30th day of May, A. D. 1876.

[SEAL.] E. O. PERRIN,
Clerk Court of Appeals.

96 Supreme Court of the United States of October term, in the year of our Lord one thousand eight hundred and seventy-six.

DAVID L. YULEE, PLAINTIFF IN ERROR,
against
FRANCIS VOSE, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States at the Capitol in the city of Washington, comes the said David L. Yulee, by Dickerson & Beaman, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that the said cause was removed to the circuit court of the United States for the southern district of New York before the trial thereof by the
97 supreme court of the State of New York, and therefore the said supreme court of the State of New York had no jurisdiction thereof.

And the said David L. Yulee, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

DICKERSON & BEAMAN,
Attorneys for Plaintiff in Error.

(Indorsed:) Supreme Court of the United States. David L. Yulee, pl'ff in error, v. Francis Vose, def'd't in error. Assignment of errors. Dickerson & Beaman, att'ys for pl'ff in error, Staats Zeitung b'ld'g, New York City.

(Indorsement on cover:) No. 166. David L. Yulee, plaintiff in error, vs. Francis Vose. New York c't of appeals. Filed 26th September, 1876.

Supreme Court of the United States.

DAVID L. YULEE,
Plaintiff in Error,

against

FRANCIS VOSE,
Defendant in Error.

No. 166

BRIEF OF EDWARD N. DICKERSON,

For Plaintiff in Error.

Supreme Court of the United States.

DAVID L. YULEE,
PLAINTIFF IN ERROR,

against

FRANCIS VOSE,
DEFENDANT IN ERROR.

No. 166. Writ of Error to New York Court of Appeals.
Brief for Plaintiff in Error.

STATE OF THE CASE.

This was an action, in the nature of a bill in equity, brought in the Supreme Court of the State of New York, in 1868, by Francis Vose, a citizen of New York, *against* the Florida Railroad Company, David L. Yulee, a citizen of Florida, Edward N. Dickerson, Marshall O. Roberts and Isaak K. Roberts, all citizens of New York. In this equitable suit the plaintiff set up an indebtedness of the Florida Railroad Company, whose notes he held, secured by the Internal Improvement Bonds of the State of Florida, and indorsed by David L. Yulee, for his accommodation, and without consideration—the object of the indorsement being to secure the good faith of the indorser in the delivery of the bonds, which were to be security for the notes when they should be issued to the Company by the trustees, which bonds were delivered, as agreed by the indorser, who was the President of the Company (*fol.* 73). No remedy was prayed against D. L. Yulee, as indorser of the said notes, or as a consequence of the fact that he was such indorser; and the only money judgment prayed for was against the other defendants, and not against David L. Yulee (*fol.* 38).

The remedy sought was an equitable one against all the defendants, as purchasers of the Florida Railroad at the sale by the trustees of the Internal Improvement Fund of Florida, who were claimed to be equitably bound to pay the notes of the Company held by the said Vose, in consequence of certain alleged facts in the bill of complaint set forth (*fol.* 19 to 38).

The equities of the bill were all negatived by the answers of the defendants, and by the proof; and a judgment was rendered by the Supreme Court, both at Special and General Term thereof, in favor of all the defendants; which judgment was affirmed in the Court of Appeals as to all the defendants, so far as there was any *equitable* claim against any one of them founded upon the allegations of the bill of complaint; but, as the complaint disclosed the fact that David L. Yulee was an indorser upon the notes, although no judgment was prayed against him by reason of that fact, the judgment was reversed as to him, and the cause was remanded to the Supreme Court for further proceedings. Thereupon, without amending the complaint, or striking out any of its parties, the case was set down to be tried as an action at law, by a jury, against the defendant David L. Yulee, as an indorser upon promissory notes.

David L. Yulee was a citizen of Florida, residing there, while the plaintiff, and the other defendants, were citizens of New York, and he was advised by his counsel that he was entitled to remove his case to the Circuit Court of the United States, under the act of 1866; whereupon a petition in proper form was prepared and filed in the Supreme Court; and when the cause was called for trial by jury, a motion was made to the court, according to a notice previously given, to proceed no further in consequence thereof; which motion the judge denied (*see fol.* 6, *and* 10 *to* 18).

A motion was then made to adjourn the trial on account of the absence of the defendant himself, who was the principal witness, and who, relying upon his right of removal, was in Florida, which was refused (*fol.* 7); and "*by direction of the Court*, the jury rendered a verdict for the plaintiff for $168,589.58" (*fol.* 9); and a judgment was entered against him for $168,589.58 with costs, notwithstanding the presentation of his petition in due form, and notwithstanding his absence (*fol.* 81).

From this judgment an appeal was taken to the Court of Appeals, but it was affirmed; and from that judgment of affirmance a writ of error was taken to this court (*fol.* 90).

The petition for removal which was filed by David L. Yulee, is entitled in the suit of Francis Vose *against* The Florida Railroad Company, E. N. Dickerson, David L. Yulee, and others; and it shows that the petitioner is one of the defendants in that suit, and a citizen of the State of Florida, and that the "matter in dispute exceeds the sum of five hundred dollars," and "that the said suit is one in which there can be a final determination of the controversy, so far as it concerns the petitioner, without the presence of the other defendants as parties," who were shown to be citizens of the State of New York (*fol.* 16). Proper security was given, and the application was in due form (*Ex. B, p.* 14).

Under these circumstances it was the duty of the State Court to proceed no further; and the refusal of the Court to recognize the statutory effect of the filing of the proper petition under the act, was error.

POINTS.

I. The filing of a petition for the removal of any cause pending in a State Court, disclosing to the Court a state of facts which, *if true*, would entitle the petitioner to a removal of his cause, is, *ipse facto, a removal of that cause;* and if there is any dispute to be made as to the truth of the averments in the petition, that dispute cannot be heard or settled in the State Court, but must be tried in the Circuit Court of the United States, on a motion to remand the cause, or otherwise, as that court may direct. If this were not the law, the right of removal might be defeated by the State Court, which might say that it did not believe the facts proved by the petitioner, or might construe the statute absurdly, and thus debar him of his statutory right.

This principle was established by the Court of Appeals of New York, in the case of Bell *vs.* Dix (49 New York, 236), so strongly that Mr. Yulee's counsel had no doubt in advising him of the removal of his cause, under which advice he felt safe in remaining at home in Florida, not supposing that case would be reversed.

The facts in that case were these:

The defendant having filed his petition to remove the cause to the Circuit Court of the United States, in pursuance of the Act of Congress of March 3d, 1863, a motion was made to suspend further proceedings in the State Court; but this motion was denied. So far, the case of Bell *vs.* Dix, and the case at bar, are exactly alike. In that

case, however, the defendant appealed from the refusal of the Court to order the case removed, and to stay the proceedings, and the General Term dismissed the appeal. The defendant then appealed from this decision to the Court of Appeals; and the order of the General Term was affirmed, *upon the express ground that the filing of the proper petition was, of itself, a complete bar to any further proceedings on the part of the Court, made so by Act of Congress, and therefore, that the Court could not be required to make any order whatever in regard to the removal, and that its order, if it made one, would be a "vain thing."* The Court of Appeals decided that "the right to "remove the cause, or the fact of removal, did not depend upon any "act or assent of the State Court;" otherwise it would make all benefit of "the right to depend on the defendant's joining in or taking "further proceedings in a court *forbidden by law to entertain them*," and that "when the application to remove a cause *is in proper form*, "it is the duty of the State Court to proceed no further in the cause," "and every step subsequently taken in the exercise of a juristiction in "a case, whether in the same court or in the Court of Appeals, is "*coram non judice.*"

The Chief Justice, and Folger, J., who concurred in this decision, were of the opinion that the case presented for removal *was not a proper case within the Act of Congress* (p. 242); and yet they held that it was not a question for the State Court to decide, but one to be decided in the United States Circuit Court itself. The language of the opinion is, "*The question of jurisdiction* must be decided by the "Circuit Court itself." Nothing could emphasize the decision of the Court so much as this expression of opinion that the case was not removable; because it practically carried the law to its logical consequences, in a case where the *right* of removal was denied by the State Court, but the *fact* of removal was adjudged to be perfect, as the result of the Statute, which enforced itself in consequence of the mere presentation of a petition, showing a *prima facie* sufficient state of facts upon which a conclusion of law had to be drawn by a tribunal other than the State Court.

This was the law when the case at bar was presented to the State Court; and Mr. Yulee's counsel had advised him, under that decision, that the presentation of the petition, *alleging the statutory facts, and in proper form*, stayed the proceedings in the Supreme Court, and that the question, whether the case was properly removed or not, must be decided in the Circuit Court upon an application by the plaintiff

there to remand the case to the State Court for want of jurisdiction. Relying upon that decision and advice, Mr. Yulee, who was in Florida, did not come to New York to be a witness at the trial; because the papers for removal had been properly executed, and there could not be a trial according to law; but the judge at the Circuit overruled Bell *vs.* Dix, and then refused a delay to procure the attendance of the defendant, who was a necessary witness, and ordered a verdict for $169,000.

In the case of Bell *vs.* Dix, Grover, J., dissented upon the point of practice, but not upon the main question in the case, which was, whether the State Court or the United States Court must determine the effect of the Acts of Congress under which the removal is claimed. This is his language: "The petitioner has done all that is required by "these sections to remove the cause, provided the *facts stated in the* "*petition show* a case within the provision of these statutes." * * "*These and other questions upon these acts that may arise upon the* "*trial, the petitioner has an absolute legal right to have determined by* "*the Courts of the United States.*"

It was not supposed to be a triable question in that case whether the "*facts stated in the petition*" were true or false, or whether upon a trial, "in a formal manner, by pleadings and proofs," as Judge Nelson held it must be, in the case of Dennistoun *vs.* Draper (5 Blatch., 336), the facts might be found otherwise than as alleged; but it was held that all "the questions upon these acts (*i. e.*, the removal acts of "Congress,) that may arise upon the trial, the petitioner has an *abso-* "*lute legal right* to have determined by the Courts of the United "States."

So that at the day when this petition was filed, containing a statement of facts, which if true, justified and required a removal of the case, the law of the State of New York was well settled, that any step taken in the case by the Supreme Court, after the filing of the petition, was *coram non judice.*

The case of Kanouse *vs.* Martin, 14 Howard, United States Supreme Court, p. 23, and 15 Howard, 199, is exactly in point. This Court in that case held that the State Court had no right to proceed with the cause, when the petition was filed in due form.

See also Fisk *vs.* U. P. R. R. Co., 6 Blatch., 362; Hatch *vs.* Chicago, R. I. & P. R. R. Co., 6 *ib.*, 105; Matthews *vs.* Lyall, 6 McLean, 13; Fisk *vs.* U. P. R. R. Co., 8 Blatch., p. 243; and Dennistoun *vs.* Draper, 5 Blatch., p. 336.

The Question Before this Court.

The only question which emerges out of the facts in this case is —Whether, when a petition for removal of a cause from a State court to the Circuit Court of the United States is presented in due form, averring all the facts necessary for a removal, the State court can lawfully proceed to trial, in disregard of that petition.

As we understand it, that is not a question either in the State of New York, or in the United States Supreme Court, open to discussion to-day ; and we suppose that this court will look no further into the case than to see that the petitioner did present the facts required by statute which, in this case has never been denied or questioned. It will not inquire whether those facts thus set forth were true, or whether there is any evidence in support, or in contradiction, of them in the record, or *dehors* the record.

In this case, however, the Court of Appeals tried the *very question* of the truth of the averment in the petition—"That the said "suit is one *in which there can be a final determination* of the contro- "versy, so far as it concerns your petitioner, *without the presence of the* "*other defendants* or parties to the cause;" which other defendants were citizens of the State of New York ; and they tried it, not by denying the main facts of the case, as they appeared in the record, and in the petition, but by giving such a construction to the statute, aided by importing into the case facts not appearing in the petition or in the pleadings, and which were supposed to contradict the petition ; from which they drew the conclusion that the petitioner was not entitled to the benefit of the jurisdiction of the United States Courts. But this is a conclusion founded upon a construction of the United States statute which that very Court had decided it was not competent to make; and if the facts were all that they were assumed to be, it would then have to be determined, as a question of law, whether the statute did not authorize removal, which question is only triable in the United States Courts.

If the Circuit Court, upon a motion to remand the case to the State Court, had tried that question, and decided it, then, upon an appeal to this court, the truth of the facts in the allegations might have been in issue; but not so on an appeal from the State Court, which, contrary to law, undertakes to pass upon the truth of the allegations contained in the petition, in due form, and which, if true, are sufficient for a removal.

The Theory of Defendants in Error.

The judge at special term gave no opinion, but simply refused to stay the trial; and nothing was put in issue or tried as to the truth of the petition. The Court of Appeals, however, looked into the record of the case, as it appeared in that court, and assumed that the facts were as stated in this brief—that is, that the Court of Appeals had affirmed the first judgment of the Supreme Court in favor of all the defendants, *in respect to the relief prayed for in the complaint*, but had remanded the case to the Supreme Court for further proceedings against the defendant, David L. Yulee, in respect to the indorsement by him of the notes mentioned in the complaint, as to which no judgment had been asked; and thereupon proceeded to decide what was the construction of the act of 1866 as applied to this assumed state of facts, and concluded that, under the true construction of the act, there was no case for removal; instead of holding, as in the case of Bell *vs.* Dix, that the question of the true construction of that act was for the United States Court to decide, and not for the State Court.

Assuming it to be true—although there is no proof of it in the record or before the Court of Appeals—that any proceedings were taken by the plaintiff in the Supreme Court, after the decision of the Court of Appeals, to dismiss the suit as to the other defendants, except David L. Yulee; and that it was competent for that court (which we deny) to pass upon the construction of the statute, after the petitioner had averred, and verified by affidavit, the facts necessary to entitle the defendant to a removal (whether that averment and proof were true or false); and yet the decision of that court was erroneous, although we presume this court will not consider that question, but send the case to the Circuit Court of the United States for the Southern District of New York, where that question is primarily triable.

The act of Congress under which the removal was asked, is the act of July 27, 1866, 14 Stat. at Large, 306; and it provides that if "in any suit *already commenced, or that hereafter may be commenced*" "* * * a citizen of the State in which the suit is brought, is or "shall be a defendant, and if the suit, so far as it relates to the alien "defendant, or to the defendant who is a citizen of a State other than "that in which the suit is brought," * * * "is one in which there "can be a final determination of the controversy so far as it concerns "him, without the presence of the other defendants as parties to the

"cause, then and in every such case the alien defendant or the de-
"fendant who is a citizen of a State other than that in which the suit
"is brought may, at any time, before the trial or *final hearing* of the
"cause, *file a petition* for the removal of the case as against him into
"the next Circuit Court of the United States, to be held in the dis-
"trict where the suit is pending," * * * "and it shall be there-
"upon *the duty of the State Court to accept the surety and proceed no*
"*further in the cause as against the defendant so applying for its*
"*removal.*"

All the defendants in this action, except David L. Yulee, were citizens of the State of New York. The original complaint did not ask for a common law judgment against David L. Yulee as an indorser of notes; but the Court of Appeals held that such a judgment was proper, under the pleadings, and as that was a question in which there could be "a final determination against him without the pres-
"ence of the other defendants or parties to the cause," it was remov-able as to him; and that right remained in him till the "*final*
"*hearing*" of the cause, even though there had been a trial, not resulting in a final judgment, but in a reversal and order for new trial. (Ins. Co. *vs.* Dunn, 19 Wall., 214; 1 Abb. U. S. Rep., 284.)

If that judgment had been asked in the beginning, the cause would have been then removed; but the plaintiff did not ask it then. As soon, however, as he did, the petition for removal was filed; and the plaintiff contends that by his not asking for the judgment in the complaint, nor until he was defeated in his equitable remedy, he has deprived the defendant of the benefit of the statute.

The first provision of the statute is that, "if in any suit already
"*commenced, or that may be hereafter commenced* in any State court,
"against an alien," etc. * * "*there can be a final determination*
"of the controversy so far as it concerns" the citizen of another State, then there may be a removal. The right of removal inheres in the party entitled to it from the moment of the *commencement* of the action in which the prescribed conditions exist, till its trial. The suit has been brought, and the condition prescribed by the act exists in it; and so long as that suit remains, that inherent right remains with it. The statute does not use language which implies that the plaintiff may at any time deprive the defendant of the right of removal, by either discontinuing the suit as to some of the defend-dants, or by any other proceeding.

If the language of the act were that in any suit "*pending*," the defendant might remove it under certain circumstances, then the language of the act might have reference to the state of affairs at the moment of removal; but the statute gives the right in any suit "*already commenced, or which hereafter may be commenced*," and in which the party seeking the removal can have a trial of his rights independently of the others.

The effect and object of removal are to disassociate him from the other defendants; and it is immaterial to him whether *they* are further prosecuted. The statute evidently intended to give him the right of removal whenever his rights were separable from the others. If the suit had been brought against him alone, he would have a right of removal, only he must have exercised it *at the time of appearing*.

The only difference between that case and this, is, that under the Act of 1866, he could exercise the right *at any time before trial;* but the reason for giving him the right is the same in both cases; and it is a mere question of practice, and not of principle, whether the right shall be asserted at one time or other in the course of proceedings.

The statute must be liberally construed in favor of the right of removal. It is a right in accordance with the theory of the Constitution, and with the object of the creation of the United States Courts; and the statutes have been constantly enlarged to remove technical difficulties in the way of a citizen of any State who may be sued in the State Courts of another State, and who seeks the jurisdiction which has been created by the Constitution, among other things, for his protection.

This case affords an illustration of the necessity of such a right; for the State Court, after disregarding the petition for removal, refused to give the defendant time to appear in the court as a witness in his own behalf, and entered a judgment against him for one hundred and sixty-eight thousand dollars, when it appeared in the decision of the Court of Appeals that he had an equitable defence to the action, to the extent of all the value of the hypothecated bonds which the plaintiff *had sold to himself without notice* to Mr. Yulee, although he was bound by contract to give him that notice before any such sale could be made; and although it appeared in the pleadings that the bonds were actually worth the whole amount of the indebtedness for which they were collateral security. The bonds are the Internal Improvement Fund Bonds of Florida, and are amply secured.

If the Statute of Removals can be defeated in this way, then any plaintiff can, after bringing a suit in which the citizen of another State is so charged as a joint defendant, amend it, *after appearance by the defendant*, by striking out the citizen defendants, and irremediably hold the foreigner in the State Court ; and he could do this by a narrow construction of the statute against its spirit and intent ; although by the statute in such a case the defendant has up to the time of trial, to decide whether he will remove his case or not, during which time the pleadings are progressing, and maturing for either court.

II. The judgment should be reversed.

EDWARD N. DICKERSON,

Counsel for the Plaintiff in Error.

Supreme Court of the U. S.

October Term, 1878.

No. 166.

DAVID L. YULEE, PLAINTIFF IN ERROR,

vs.

FRANCIS VOSE.

In Error to Court of Appeals of the State of New York.

WM. M. MERRICK,
Of Counsel for Plaintiff in Error.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

Supreme Court of the United States.

October Term, 1878.

No. 166.

DAVID L. YULEE, PLAINTIFF IN ERROR,

vs.

FRANCIS VOSE.

In Error to Court of Appeals of the State of New York.

BRIEF OF PLAINTIFF IN ERROR.

This was originally an action under the Code of New York, brought by Francis Vose against the plaintiff in error, a citizen of Florida, and several other citizens of New York, to enforce against them jointly as purchasers of the late Florida Railroad, an extinct and insolvent corporation, certain money demands arising out of notes issued by that Company, and which bore the endorsement of the plaintiff in error.

The Supreme Court of New York decided that Vose had no claim, legal or equitable, against the defendants which was

affirmed on appeal with the exception that the Appellate Court held that in the progress of the voluminous pleadings by complaint, answer and trial before the equitable forum, there had been generated enough to constitute an action on the law side of the Court against Yulee as endorser of the notes in question. Thereupon they sent the cause down to be further proceeded with as an action at law against him, and being called for trial he interposed an application under the Act of Congress of July 27th, 1866, for removal of the cause to the United States Circuit Court, which application was refused, although all the jurisdictional facts essential to removal were spread upon the record by the petition and accompanying affidavits of his counsel, and the requisite bond tendered. The cause was then proceeded with and a verdict and judgment rendered for the plaintiff against Yulee alone, which was affirmed upon appeal, and from that judgment of affirmance the present writ of error is brought, upon which the following

ERRORS ARE ASSIGNED.

1st. That upon filing the proper petition and accompanying affidavits together with the requisite bond for removal all further jurisdiction over said cause was arrested; and the hearing and judgment in the case and its affirmance by the Court of Appeals were erroneous and without competent authority in law.

2d. That it was not competent for the State Courts to enquire into the truth of the jurisdictional facts supplied by the record, but the question of jurisdiction belonged to the Federal Court, and it was error in the State Court to hear and determine upon their verity and sufficiency.

1st. Upon the foregoing statement and assignment of errors the plaintiff in error submits that all the conditions to bring the

case within the Removal Act of 27th July, 1866, viz: citizenship of plaintiff in New York, citizenship of Yulee in Florida, citizenship of other defendants in New York, the same State with the plaintiff, the divisibility of the claim against the party asking removal from that against other defendants, and lastly, a sufficient bond for removal tendered. All these facts being patent upon the face of the record, there remained no discretion in the State Court, but all further control over the cause was arrested by the application to remove. Nor was it necessary that these facts be stated in any logical order or manner. Their apparent existence was all that was requisite to the perfection of the right of removal.

Ins. Co. vs. Pechner, 95 U. S., 183.
Gold Washing Co. vs. Keyes, 96 U. S., 202.
Railway Co. vs. Ramsey, 22 Wallace, 326.

2d. That by the terms of the Act of July, 1866, the right of removal attached to the defendant at the commencement of the suit, and ran throughout the existence of the cause. The language of the Statute is, that if "in any suit already *commenced*, or that hereafter may be commenced," * * * "the defendant who is a citizen of a State other than that in which the suit is brought, may at any time before the trial or final hearing of the cause file a petition for the removal," &c.

It was, therefore, not within the power of the State Court, by its judgment, to make a several case against Yulee, so as to deprive him of the right of removal. Indeed it would seem that the case was never ripe for removal until the power to make it a several case was completed by the judgment of the State Court. An inspection of the record shews that the plaintiff sought to charge Yulee jointly with the other defendants. Then so long as the cause of action was joint, there was no power under the Statute to remove. The right of removal exists only where the case assumes that form in which it is capable of a final

determination "so far as it *concerns him without the presence of the other defendants as parties to the cause.*" It appears, therefore, to be within the very spirit, if not the letter of the Statute, for the defendant to wait until such action as by the judgment of the Court or by the alterations of the record a case is presented which dispenses with the presence of all other defendants, and in that light the act of severance performed by the judgment of the Court below should have been regarded as removing the only impediment to a change of tribunals instead of being erected into a bar to such change.

3d. The right of removal depends upon the facts as they exist when the suit is commenced, and the jurisdiction to remove having once attached, no subsequent event could divest it.

Roberts vs. Nelson, 8 Blatchford, 77.
Clark vs. Matthewson, 12 Peters, 164.

Neither could a change of parties oust jurisdiction.

Morgan vs. Morgan, 2 Wheaton, 290.

4th. The right of removal cannot be divested by amendment.

Kanores vs. Martin, 15 Howard, 208.

Neither can the joining of defendants in a suit not within the limitations (as prescribed by the Act of July, 1868, 15 Stat., 226,) be permitted to withdraw a cause from the Federal tribunals. "If this were admitted," says Nelson, Justice in Fish vs. Union Pacific Road, 8 Blatchford, 248, "the privilege extended to the parties setting up a right under the Constitution and laws would in most, if not in every instance be defeated. Indeed, if any such principle could be admitted, most of the acts of removal depending principally upon the subject matter, and intended to secure the interpretation of the Constitution and laws of the United States at the original hearing, to their own judiciary, would be futile and worthless."

Now it is submitted that a similar mischief in the deprivation of the citizen's constitutional right to resort to the Federal Courts under the Act of 1866, would be ensured if a plaintiff might join other defendants of his own State with him, and then after the appearance time had passed so that the defendant could not avail of the 12th section of the Act of 1789, by amendment, *non pros.* or confession of judgment, as respects the other defendants, irrevocably subject the citizen of another State to the infirmities of the local Courts. Any construction which would operate such a fraud upon the constitutional rights of the citizen cannot be a just construction; and that especially in respect to Statutes which this Court, in Ins. Co. vs. Dunn, 19 Wallace, 214, has declared to be remedial and therefore to be construed liberally in furtherance of the right to be secured.

5th. Especially should the construction be most liberal in order to secure the right, and to harmonize all conflicts of jurisdiction which are constantly springing up from the confusion of law and equity and the kaleidoscopic shifting of parties and causes of action under the Codes of the States, while the Statutes of the United States and the practice of this tribunal are anchored to the lines which divide Courts of Law from Courts of Equity. The case of West vs. Aurora, 6 Wallace, 133, is a feeble illustration of the difficulties into which we plunge by attempting to measure remedies and rights under the Constitution and laws of the United States, by the proceedings under State Codes.

WM. M. MERRICK,
of Counsel for Plaintiff in Error.

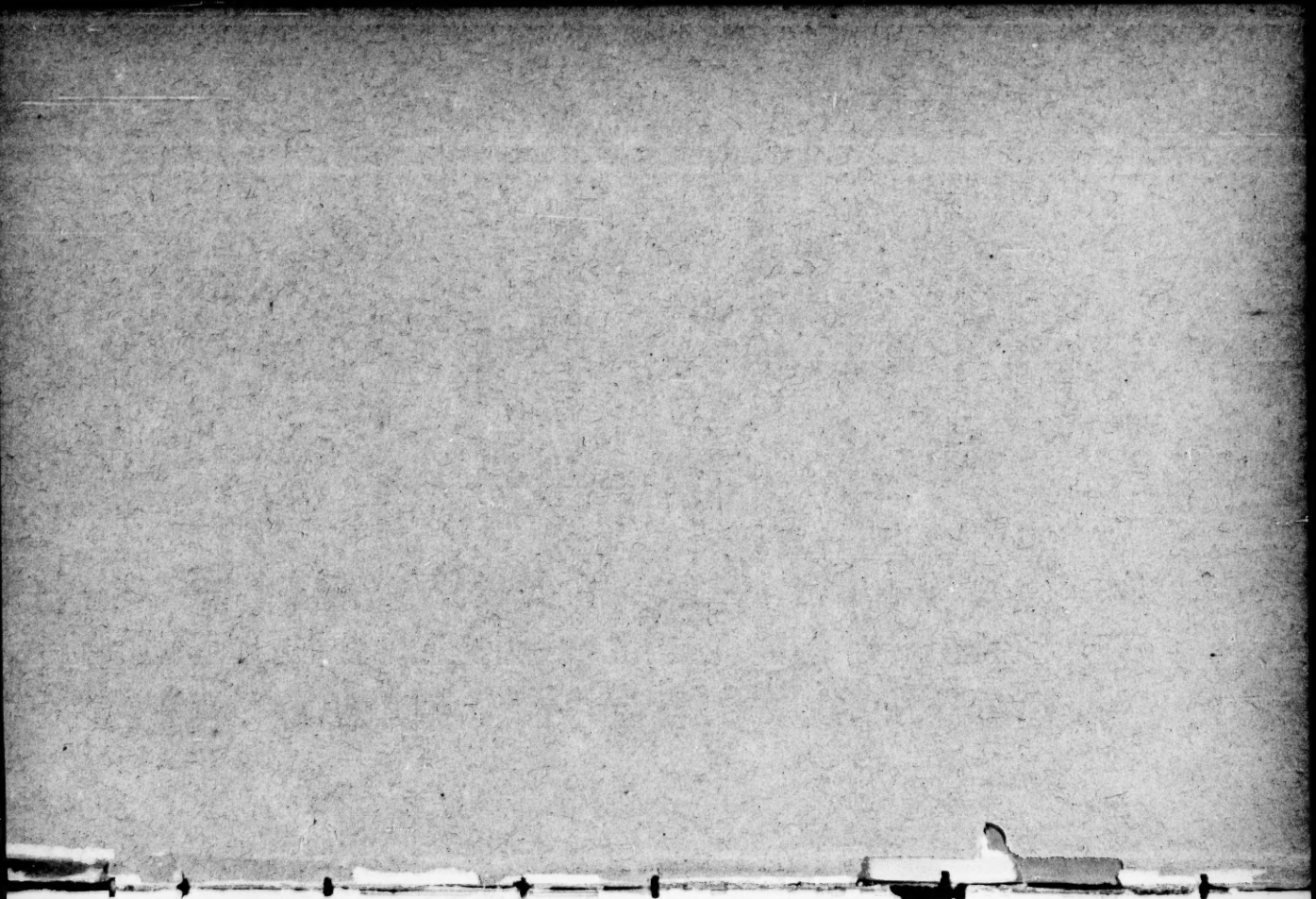
Supreme Court of the U. S.

DAVID L. YULEE
vs.
F. VOSE.
No. 166.

Brief of P. PHILLIPS for Defendant in Error.

P. PHILLIPS.

R. O. Polkinhorn, Printer.



Supreme Court of the U. S.

DAVID L. YULEE
vs.
F. VOSE.
No. 166.

Brief of P. PHILLIPS for Defendant in Error.

This is a writ of error to the Court of Appeals of the State of New York.

The assignment of error presents the only question within the jurisdiction of this court, to wit:

"That the cause was removed to the circuit court of the United States for the southern district of New York before the trial thereof by the Supreme Court of the State of New York, and therefore the said Supreme Court of the State of New York, had no jurisdiction thereof." p. 46.

Vose filed his complaint against Yulee and others in the Supreme Court of New York, in October, 1867. This was served on the 15th February, 1868, and an answer filed by Yulee on the 9th May, 1868.

Judgment was rendered at a special term for all of the defendants on 14th December, 1869, and, on appeal to the General Term, this judgment was again affirmed.

Vose then took the case to the Court of Appeals, where the judgment, as to all the defendants, was again affirmed, except as to Yulee, as to whom it was reversed, and a new trial granted.

This statement of facts is to be found in the Record, p. 2, recited in the paper styled "Case and Exceptions."

It is again to be found in the Record, recited in the judgment of the Supreme Court, rendered on 13th June, 1873. p. 41.

And again, the same facts are stated in the opinion of CHURCH, Chief Justice of the Court of Appeals, copied in the appendix for the convenience of the court, and reported in 64 N. Y., 450.

After the decision in the Court of Appeals, and the filing of the remittitur in the Supreme Court, the record also shows that Yulee, on 26th February, 1873, entered a motion at a special term that the cause be removed to the circuit for trial as a jury cause; and the Court thereupon directed "the clerk to place the cause on the circuit calendar for trial, according to its date of issue." p. 40.

Under this order the cause came on for trial before Judge BARRETT on the 9th June, 1873, when a verdict was rendered in favor of the plaintiff against Yulee, on which judgment was rendered on 13th June. p. 41.

Yulee then carried the cause to the Court of Appeals, where the judgment against him was affirmed, and it is this judgment now sought to be reviewed in this court.

As indicated by the assignment of errors, the matter of complaint is the refusal of the court to permit a removal of the cause to the Circuit Court of the United States.

Now, whether there be error in this, depends upon the relation Yulee bore to this suit at the time he applied for the removal; that is to say, was he the sole defendant, or was he a co-defendant with others, and within the description of the act of 27th July, 1866?

That act gives to the alien defendant, or to the defendant who is a citizen of a state other than that in which the suit is brought, the right to remove the cause, "when there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties to the cause."

The application of Yulee, it is true, follows the description of the act in declaring: "this suit is brought by the plaintiff against the defendant on sundry promissory notes, &c.; and that the said suit is one in which there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties to the suit."

But when this petition was filed, the Supreme Court and the Court of Appeals had dismissed from the cause all of the defendants but Yulee, and the case stood in the same plight as though they had never been parties to the cause.

It is on this ground it was held that Yulee was not within the terms of the act.

The facts upon which the decision rests are thus summarily disposed of in the brief of plaintiff in error:

"It is assumed that there were not, at the moment of presenting the petition, several parties in this action, besides D. L. Yulee, who were citizens of the State of New York; *but that is a mere assumption, and there is nothing in the record which shows what was the position of the case in the court,* or whether there was any proceeding which possibly could be taken by the plaintiff in respect to any of the other defendants. The complaint was not amended, and it stood on record as a suit against all the other defendants."

Dickerson's Brief, p. 4.

Again, "The plaintiff, objected to the removal upon the ground that the suit had been dismissed as against the other defendants, *of which, however, there is no proof in the record.*" p. 9

It is to meet these positive denials that we have heretofore referred with particularity to the averments and recitals to be found on pp. 2 and 41 of the record.

The opinion of the Court of Appeals, though not found in the transcript after adverting to this same state of facts, says: "When the remittitur from this court was sent down and made the judgment of the Supreme Court, the only defendant to the action was Yulee, and *we can take judicial notice of this fact from our own records.*"

We come now to the proposition of law on which the plaintiff in error relies.

It is asserted that if the petition for removal, on its face, is in accordance with statutory requirement, then the State court has no right to inquire into the truth of its statements ; " " that this is subject only to inquiry in the circuit court on a motion to remand the case to the Supreme Court of the State, and could not be judged of or passed upon by the State court." p. 3.

Again, " Whatever might be the true state of facts that was not triable by the State court but was triable only by the Circuit Court of the United States."

Again, " The Court will look no further into the case than to see that the petition set forth the facts required by statute. It will not inquire whether those facts thus set forth were true, or whether there is any evidence in support *or in* contradiction of them *in the record* or *dehors the record*."

Still further, " The State court undertook to decide, as the motion papers show, what it had no right to do ; and it is, therefore, *entirely immaterial in this issue whether that decision is right or wrong*. The only issue here being whether the State court had jurisdiction over the question at all." p. 10.

This frequent repetition of the same idea gives assurance of the earnest conviction of counsel, but it has no foundation in any legal principle or any support in statutory requirement.

The State court had full jurisdiction of the cause *ratione personæ* and *ratione materiæ*. To oust the jur-

isdiction by virtue of the requirements of the act of 1866, it was not enough that the party should state the facts entitling him to remove the cause, and then say to the court, whether these facts are shown to be false by evidence "in the record or dehors the record," you have nothing to do with it.

Applying the principle asserted to the direct matter in this case, Yulee asks the court for a removal on the statement that he is a co-defendant with others, and his case one that can be finally determined, "so far as concerns him, without the presence of the other defendants as parties to the cause."

The Court replies: Mr. Yulee, you are the sole defendant in the cause, and, therefore, your statement, though within the description of the statute, is not true in point of fact.

The rejoinder by Yulee is: the falsehood of my statement you have no concern with; whether it be true or false you are bound to cease all concern with the case except to send it to the Circuit Court. When it gets there, if that court determines the statement to be false it will be sent back to you.

If the proposition contended for be true, then the State court is paralyzed and without power to protect its own jurisdiction, or the right of its suitors, against fraud.

We submit that such a result was never in the contemplation of the legislature.

The first removal provided for is to be found in the

12th section of the judiciary act of 1789, and is in these words:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, *to be made to appear to the satisfaction of the court*, and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court, &c., *and offer good and sufficient surety* for entering in such court, on the first day of its session, copies of said process against him, &c., it shall then be the duty of the State court to accept the surety and proceed no further in the case.

Under this act it was held that, "it must appear to the satisfaction of the State court, that the defendant is an alien or a citizen of some other State than that in which the suit is brought, and that the matter in controversy, exclusive of costs, exceeds the sum of $500.

Gordon vs. *Longest*, 16 Pet., 103.

It is very evident that, under this act, the State Court had another matter within their "legal discretion," to wit, the sufficiency of the bond.

As one of the conditions for removal is the offer of "good and sufficient surety," it necessarily follows that the court in which it is offered must be satisfied of its sufficiency.

Adverting now to the act of 1866, we find similar provisions in reference to matters submitted to the legal discretion of the State court. It enacts that, "In any suit in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the State in which the State is brought is, or shall be, a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is a citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may at any time before the trial or final hearing of the cause file a petition for the removal of the cause as against him," &c., &c.

It will be seen that this act differs only from its predecessor in providing for the case where there were several defendants of different States.

As the court, by its unanimous decision in the case cited, held that under the former act it must appear to the satisfaction of the court that the petitioner was an alien or non-resident defendant, so it necessarily follows that, under the latter act, it must appear to the satisfaction of the court that the peti-

tioner was one of several defendants, and within the description of the act.

The principle contended for by the plaintiff in error, as applied to the case at hand, is this: that as he asserts in his petition he is one of several defendants, and that his cause can be determined without the presence of his co-defendants, the State court was bound by his assertion, though the record itself shows that the case in which the application is made has but one defendant.

Passing to the act of 2d March, 1867, which provides that, "in a suit in which there is a controversy between *a citizen of the State* in which the suit is brought and *a citizen of another* State, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason in, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition for removal, &c.

The power of the State court, under this act, is more limited than in the two preceding acts, so far as the removal is based upon prejudice or local influence, for the act merely requires an affidavit of the applicant's belief, which, in the nature of things, is not the subject of controversy.

Nevertheless, the State court must necessarily decide whether the status of the applicant and the case are such as comes within the act.

In "case of Sewing Machine Companies," 18 Wall., 533, the State court refused the application, under this act, made by two of the non-resident defendants, there being another defendant who was a citizen of the same State as the plaintiff.

The State court passed upon the construction to be given to the statute. The form of the application was in all things regular, but the Court held that the parties were not legally entitled.

On writ of error this Court held that the construction of the State court was right, and affirmed the judgment.

The same question was again made in the Superior Court of Massachusetts in *Vannevar* vs. *Bryant;* the same ruling was made by the State court, and this judgment was also affirmed in 21 Wall., 41.

I do not find, in the numerous cases in which the judgments of the State courts affecting the subject of removal, brought here for review, that a reversal was ever before claimed uponthe sole ground now occupied by plaintiff in error, to wit: "That this court will look no further into the case than to see that the petition sets forth the facts required by the statute (and that) it will not inquire whether those facts thus set forth were true, or whether there is any evidence in support or in contradiction of them, in the record or *dehors* the record."

We, therefore, assume it to be well established that the State court had authority to determine the question whether, in the case as made by Yulee, he was entitled to the removal of the cause.

Of course if the Court erred in this determination, then he has been denied a right claimed under an act of Congress, and he is entitled, by his writ of error, to a reversal of the judgment.

It is insisted by the plaintiff in error that the court erred in determining that Yulee was the sole defendant when he filed his application for the reason, that after the judgment had been rendered dismissing the other defendants, "the complaint was not amended, and it stood on the record as a suit against all the defendants." p. 4.

The effect of these judgments as completely severed the connection of these defendants from the suit as if the technical entry had been made that "they go hence without day."

From the time of the entry of such judgments neither the plaintiff nor the court had power over them for any purpose whatever, and it was wholly unnecessary that the plaintiffs should strike their names from his complaint. That had been done already by competent authority.

The complaint was filed against all the defendants, on a joint liability, and sought to hold them as trustees.

Yulee, in his answer, sought to defeat this liability by setting up the agreement of 31 October, 1858, (p. 26), by which the plaintiff was to recover certain promissory notes endorsed by him as a substituted security. (p. 38.)

Whether, on this state of the pleadings, Vose could recover against Yulee, as endorser on these notes, de-

pended upon the law of the forum at the time when this suit was commenced. The decision of the court does not create law but only declares it.

It is said: "Mr. Yulee's counsel did not so understand the complaint;" but the mistake of counsel can have no effect in determining the legal rights of parties to the suit.

We submit that the judgment of the court below should be affirmed, and refer to the unanimous opinion of the Court of Appeals, as delivered by CHURCH, C. J., to be found in the appendix.

P. PHILLIPS.

APPENDIX.

COURT OF APPEALS.

FRANCIS VOSE, Respondent,
Against
DAVID L. YULEE, Appellant.

CHURCH, C. J.:

The learned counsel for the defendant urges two grounds for reversal of the judgment.

First. That the action was removed before trial to the Circuit Court of the United States; and, *second*, that evidence was improperly rejected.

An attempt was made to remove the case to the United States Circuit Court, under the act of 27th July, 1866, (14 U. S. Stat. at Large, 306), which provides for a removal in a case where the action is against more than one defendant, one of whom is a citizen of a State other than the one in which the suit is brought, and as to whom a final termination of the controversy as to him may be had without the presence of the other parties.

The fatal objection to the claim for removal is, that the defendant, Yulee, was the only defendant at the time the attempted removal was made. The action was originally against Yulee and several others. Upon the trial the complaint was dismissed as to all the defendants, which was affirmed at the General Term, and, upon appeal to this court, the judgment

was affirmed as to all the defendants except Yulee, and reversed as to him, and a new trial granted (50 N. Y., 369). When the remittiture from this court was sent down and made the judgment of the Supreme Court, the only defendant to the action was Yulee, and we can take judicial notice of this fact from our own records. The defendant was not, therefore, entitled to a removal of the case under the act of 1866, and it was too late to apply under the act of 1789. Nor could he have made a case under the act of 1866 in the original action. for the reason that the claim was against all the defendants upon a joint liability in equity. When it went back it was substantially an action at law against the defendant as endorser of certain promissory notes. If the action had been brought against him originally in that form, he might have made a case for removal under the act of 1789, but this cannot aid him in making a case under the act of 1866. It is unnecessary, therefore, to determine whether the defendant could avail himself of the point upon the trial, or whether he must seek his remedy by motion, and, if denied, upon appeal from the order.

Assuming that a compliance with the statute operates to remove a case without any action of the court, a State Court will not oust itself of jurisdiction unless a plain case is made. The party is at liberty to apply to a United States Court for a mandate staying proceedings in the State Court, and if he omits to do this he must at least show that he has strictly complied with the statute (49 N. Y., 238).

It was held by this Court when the case was here before that the defendant was entitled to be allowed the value of certain bonds which had been sold without notice; and at the trial the plaintiff was asked if he had not procured an injunction restraining the internal improvement company from selling certain lands, and ordering the payment of bonds.

Perhaps this question might have been proper as preliminary to an inquiry as to the value of the bonds in question, but there was no specification of bonds, and no offer or proposition to prove the value of the bonds, and it requires some astuteness to see how the obtaining of an injunction could affect the question of value. The relevancy of the question is not apparent, and the counsel do not suggest any additional facts to make it so.

Judgment affirmed.

P. F. McGREEN, Law and Job Printer, 14 and 16 Ann St., N. Y.

Supreme Court,

OF THE UNITED STATES.

DAVID L. YULEE,
Plaintiff in Error,

vs.

FRANCIS VOSE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Error to the Court of Appeals of the State of New York, affirming a judgment in favor of defendant in error.

Statement of Case.

This action was commenced in the Supreme Court of the State of New York, October 25th, 1867, against the Florida Railroad Company, David L. Yulee, Edward N. Dickerson, Marshall O. Roberts and Isaac K. Roberts (p. 9).

All of the defendants appeared in the cause and answered, and the case came on for trial, November 1st, 1869, when judgment was rendered, dismissing the complaint. An appeal was taken to the General Term, where the judgment was affirmed, and an appeal was then taken to the Court of Appeals, where the judgments of the Courts below were affirmed as to all the defendants, except the plaintiff in error Yulee, and as to him, the judgment was reversed, and a new trial ordered. (See case on first appeal, reported Vose *v.* Yulee, 50 New York Reports, 369.)

The defendant, Yulee, then became the sole defendant in the case.

The cause came on for trial at Special Term, where mixed questions of fact and law are tried by the Court without a jury. Counsel for plaintiff in error moved to transfer the cause to the New York Circuit (Jury Term,) for trial, and this motion was granted, and the cause was thus, at his request, placed upon the Circuit Calendar (p. 40, fol. 78).

When the cause came on for trial at Circuit, after the jury were empaneled and the case opened for plaintiff, on June 9th, 1873, counsel for plaintiff in error appeared on the trial, and moved the Court to dismiss the complaint for want of jurisdiction, on the ground that the defendant had taken the proper proceedings to remove the cause to the U. S. Circuit Court, under the Act of Congress of July 27th, 1866, which motion was denied (p. 2, fol. 6).

Counsel for plaintiff in error then moved to send the case back to Special Term again, from which it had just been sent on his own motion on the ground that the pleadings call for a remedy at law, which motion was denied (p. 2, fol. 6).

Counsel for plaintiff in error appeared at the trial; offered evidence (fol. 8); took exception to rulings (fol. 10); and generally submitted to the jurisdiction of and had his day in Court.

The jury were directed to render a verdict for defendant in error (p. 4, fol. 9); and judgment having been entered, the plaintiff in error appealed to the General Term of the Supreme Court, where the judgment was affirmed (fol. 83). The plaintiff in error then appealed to the Court of Appeals, where the judgment was again affirmed (fol. 87; see also 64 New York Reports, p. 449); and the plaintiff in error then obtained a writ of error from the Court of Appeals to this Court, on the ground that "a right privilege or immunity was claimed under a Statute of the United States, and the decision was against the right privilege or immunity specially set up, or claimed under such Statute" (fol. 91).

A single error is assigned by the plaintiff in error, viz.: "that the said cause was removed to the Circuit Court of the United States for the Southern District of New York, before the trial thereof, in the Supreme Court of the State of New York, and therefore, that such Court had no jurisdiction thereof" (fols. 96–7).

First.

The question is whether the case was effectually removed from the State Court to the U. S. Circuit by the petition and proceedings of the plaintiff in error. An *attempt* to remove not made under and in conformity with the statute law on the subject is not of any legal significance, and cannot be set up in opposition to

the action of the Courts below, or to impeach the final judgment under review.

1.—The removal of causes from the State Courts to the Federal Courts is not effected by the decision of any Court whatever, or by any writ, or process from any Court. It is *the act of the party* under and in accordance with the statute law. If his act conforms to the law in a case contemplated by the law, the removal is *ipso facto* made. The State Court has thereby lost its jurisdiction, and the Federal Court has acquired it. If the act of the party does not so conform to the law in a case provided for by law, the State Court has not lost jurisdiction, and the Federal Court has not acquired it.

2.—The State Court having jurisdiction originally, and being fully possessed of the case, by inevitable logic must decide for itself whether it will proceed. It cannot either proceed or refuse to proceed without such a decision. The State Court *cannot* rightfully abdicate its powers. In cases of transfer or removal under the Federal laws, its powers can be *taken away*, but they cannot be voluntary *given* away, and the Court must *ex necessitate* determine whether they are taken away.

3.—And this is the result of a principle familiar and of every-day use in all courts, from the highest to the lowest. Every court, high or low, State or Federal, in every case or proceeding instituted

before it, determines for itself the question (if there be a question) of its power and jurisdiction to proceed. The decision being always subject to review in the proper appellate court, and being moreover open to collateral attack, if a jurisdictional error of a character to render the proceedings *coram non judice* has been committed. In the exercise of precisely the same function, a Court must decide whether it has *lost jurisdiction* by the act of a party in attempting to remove the controversy to another forum.

If the decision is erroneous, whether in respect of having acquired original jurisdiction or in respect of having lost it, the judgment will be reversed, and in the last resort will be reviewed and reversed in this Court, on writ of error or appeal, from the highest State Court.

4.—Such has been the uniform current of authority in this Court. (See Gordon *v.* Zingest, 16 Peters, 97; Kanouse *v.* Martin, 14 Howard, 23; Same case, 15 *id.*, 198; Gardner *v.* Brown, 21 Wall, 36.) In no case has this Court ever suggested that the proceedings and final judgment in the State Courts were erroneous, on the mere ground that an irregular and abortive attempt at removal had been made. The attempt of the party either effects his purpose according to law, in which case the State Court has lost its jurisdiction, and its judgment will be reversed; or does not effect his purpose, in which case the jurisdiction remains, and the judgment will be affirmed. There is no middle ground.

5.—The preceding observations are deemed a sufficient answer to the contention of the plaintiff

in error—that the State Court lost its jurisdiction *by the mere force of his petition*, whether he did or did not petition in a case covered by the law under which he professed to proceed. The State Court looked at the record of the controversy before it and held it to be within its power, and therefore its duty to proceed on the ground that jurisdiction was not taken away. *And that is the question now under review.*

Second.

The plaintiff in error petitioned for the removal of the controversy under the Act of Congress, passed July 27, 1866, entitled "An Act for the removal of causes in certain cases from the State Courts." The attempt was not made until the cause came on for a *second trial* before the Court and jury, and after the case had been once through all the State Courts and a new trial had been granted. The grounds of removal, as stated in his petition, are simply that the plaintiff in the action was a citizen of New York, where the suit was brought; that he, the plaintiff in error, one of the defendants in the suit, was a citizen of Florida; that the amount in controversy exceeded $500; that the plaintiff, Vose, brought the suit against him, demanding judgment against him as the endorser of promissory notes; and "that the suit was "one in which there can be a final determina- "tion of the controversy, so far as concerns

"your petitioner, without the presence of the "other defendants as parties in the case." We say that the plaintiff in error totally failed in his attempt to remove the cause under the statute referred to.

I. The statute provides for a peculiar case, where the suit is brought, by a citizen of the State in which it is instituted, against an alien, or citizen of another State, *and also against a citizen or citizens of the same State as the plaintiff*. This condition as to parties existing, then, on the further condition that "the suit is one so far as it relates to the alien or non-resident citizen defendant, in which there can be a final determination of the controversy so far as it concerns him, without the presence of the other defendants as parties to the cause," then such alien or non-resident citizen defendant may file his petition for removal "*as against him*" at any time before "the trial or final hearing" of the cause. Such a case could not be removed under any antecedent law. The only antecedent statute was sec. 12 of the Judiciary Act of 1789, according to which the sole plaintiff and the sole defendant must be citizens of different States, or, in case of more numerous parties, *all the defendants* must be citizens of a State or States other than the State of which the plaintiff or any of the plaintiffs are citizens. In this particular case the removal could not be made under the Act of 1789 for the further reason that the petition under that Act must be filed at the time of entering appearance.

II. The suit was not one to which the statute of July 27, 1866, had any application, because (without

noticing in this connexion the question as to parties), on referring to the complaint, it is found that it charged *all the defendants jointly* with an equitable liability as trustees of the rents, income and profits of a railroad for the plaintiff's benefit, and the prayer is for a joint judgment or decree against them all. As to this point, we understand it is conceded that the suit in its original constitution, or any part of it, was incapable of removal under the Act of 1866, even although the condition as to parties might exist contemplated by that statute. Therefore the plaintiff in error made no attempt to remove until the question of joint liability of all the defendants had been eliminated from the case, as next mentioned.

III. The record of the case as brought up shews that the suit was first brought to trial against all the defendants; that on such trial the complaint was dismissed as to them all, and judgment accordingly rendered December 14, 1869; that this judgment was affirmed in the Court of first appeal February 25, 1871, and by the Court of final appeal in the State December 7, 1872, *as to all the defendants, except Yulee, the plaintiff in error*, against whom, and against whom only, the judgment was reversed, and a new trial was ordered. Thus the suit had utterly ceased to exist as to all the other defendants, and nothing remained of it except an action in favor of *Vose*, plaintiff, against *Yulee*, defendant, on a special averment in the complaint of a particular liability against him distinct from the joint equitable liability charged against them all jointly. Now, nothing can be plainer than that a final, irreversible and unappealable judgment in favor of the other defendants put them out of Court

without day, or than that the suit was no longer pending or existing as to them.

IV. Therefore, it is indisputable, that when the cause came on for a second trial against Yulee alone, June 9, 1873, he petitioned as *sole defendant* for a removal of the cause under the Act of July 27, 1866; and inasmuch as that statute only provides for a special case where there are other defendants citizens of the same State with the plaintiff, the actual case was not within the statute, and the Trial Court rightfully proceeded with the cause.

V. The suggestion is untenable, that the statute refers to any condition of the suit, in which, from being a suit against both resident and non-resident defendants, it has become one against a single non-resident citizen. To such a condition it has no application, and for such a condition it makes no provision, and does not even speak at all. In such a situation the sole remaining defendant is left just where the law had left him from the foundation of the Federal Government; and if the statute in making a new case for removal did not include him, there is no serious ground for complaint.

The words of the statute are of irresistible force. They in terms require, as the condition of this new right of removal, that there *be other parties defend-* "*ants without whose presence*" the controversy can be determined *as to the moving party*. Again, the removal is only of the suit "*as against him;*" and further on in the same section it is declared that "such removal shall not be deemed to take away "the right of the plaintiff to proceed in the State

"Court at the same time against the other defend-
"ants." To apply the statute to the case of a sole defendant at the commencement, *or in any stage of the action*, seems a palpable violation of its language.

VI. In yet another and very exact, as well as very material, view of the case, the plaintiff in error failed in his attempt at removal. As already stated, it is a fundamental condition of the right of removal under the statute referred to, that besides a defendant who is an alien or citizen of another State, *there must be another defendant or other defendants who are citizens of the State where the suit is brought and when it is brought.* Now, we say, the petition must set forth the grounds on which it proceeds, and must bring the case within the statute. It is not enough that it prays for removal without showing on its face the right of removal. On looking at the petition of the plaintiff in error, we find that it names no defendant except himself, *and totally fails to show that*, in fact, there was, or ever had been, any other defendant citizens of New York, where the plaintiff resided and where the suit was brought. This is fatal.

True, there appears printed in the record an affidavit of Mr. Dickerson (page 8), entitled in the suit, setting forth that the other defendants "are" citizens of New York—that is, they are such citizens June 4, 1873, the date of the affidavit, which is nearly six years after the suit was commenced. But Mr. Dickerson was not the petitioner, nor does it appear that he was attorney or agent of the petitioner, nor is any reason shown why he should make any affidavit at all. And for all that appears in this affidavit, or in the petition itself, none of the

conditions as to the parties and their citizenship in any State existed at the time the suit was brought, so as to give the right of removal under the statute. All that is sworn to may be literally true, and be perfectly consistent with the non-existence of any such conditions. It is not enough to show that such conditions exist six years after the suit is instituted.

This point was decided in The Ins. Co. *v.* Peckner, 5 Otto, 183, where it was held that the petition or record must affirmatively show the necessary condition of citizenship as existing at the *very time when the suit was commenced.* In that case the petition stated the citizenship as a *present fact*—that is, as a fact true when the petition was verified, a date which *was only ten days* after the suit was brought. The Court held the objection fatal. This was under the Act of 1789; but it is not disputed, that whatever else the Act of 1866 means, it does certainly mean that the suit to which it applies must include defendants who are citizens of the State where it is brought. (See also Amory *v.* Amory, 5 Otto, 186, and 6 Otto, 199.

Third.

In the condition of this suit in June, 1873, when the plaintiff filed his petition as it is said, for removal, he had a perfectly clear right to remove the case under the Act of March 2, 1867 (Statutes, vol. 14, p. 558), on the condition of swearing to "prejudice and local influence," as the reason for such removal. He had

no other right of removal, because in addition to the grounds already argued, the statute last named abrogated any other right in his favor as supposed to exist under the prior statute of July 27, 1866.

1. The Acts of 1866 and 1867 consist each of a single section. The last Act professes in its title, as well as in its enactment, to *amend* the previous one. It begins, "The Act entitled," &c., "passed," &c., "*is amended as follows.*" This imports that what follows becomes the law instead of the previous enactment; *at all events so far as relates to any point or particular subject included in both the statutes.* It is entirely insupposable, that the Legislature intended to leave in force two conflicting or different rules, applicable to the same subject and the same situation.

2. It is very plain that the amendment of March 2, 1867, covers and includes the present case as it was situated in June, 1878, when the attempt at removal was made, because, although originally there had been other parties and another controversy, yet at *that time* the case had been narrowed down to the plaintiff, a citizen of New York, and the defendant, a citizen of Florida, and *to a controversy between them alone.*

3. Now, this situation and the subject of legislation are described with the greatest exactness in the

Act of March 2, 1867. The words are: "Where a "suit is pending, or shall be hereafter brought in a "State Court, in which a controversy *exists* between "a citizen of the State in which the suit is brought, "and a citizen of another State, and the matter in "dispute exceeds five hundred dollars, such citizen "of another state," ** "if he will," &c., "may," &c. There is not in language any power of expression, more precisely defining the situation of the present case, as it was when the petition of removal is said to have been filed. *A suit* had been brought and was pending, in which there was then *existing* a controversy between the plaintiff, a citizen of New York, where it was brought, and the defendant, a citizen of Florida; and this controversy then existed between the plaintiff and defendant alone; all other parties and all others controversies having then been eliminated from the case by the action of the State Courts.

4. Observe the force of the word "exists" as we find it in the statute. It marks with absolute certainty the *present tense* of the situation when the removal is claimed, without regard to the situation of the same case in any past tense. Observe also the words "when a suit is pending (at the time the Act was passed), or shall hereafter be brought in a State Court, in which," &c. No broader expression could be used. It comprehends *any suit* in which a controversy exists between, &c., but for all present purposes we are content to say that the controversy here spoken of must be a controversy existing solely between the resident and non-resident citizen, and that there must be no other parties, or if there are, then they must be nominal parties without interest, or at least without

interest adverse to the plaintiff. In the present case there was no other party in the cause.

5. Thus we see that the Act of 1867 describes in exact words the very case now under review, and provides for it with equal precision in the enacting part. But the plaintiff in error says, that the Act of July 27, 1866, under which he took his proceedings, describes and provides for the same situation. We have, as we think, shown the contrary in considering that point. *But grant it, and what then?* Why, then we find that the later Act, in "*amending*" the former one, addressing itself to the same situation, and subject, *changes the mode of removal by prescribing a very different mode.* In the Act amended, it is only necessary to show that the separate controversy affecting the non-resident citizen defendant, can be determined *without the presence of the other defendants.* In the amending Act this is not found at all, and the only requirement is that an affidavit shall be made showing "prejudice and local influence" as the reason for removal. This is plainly a change of the law of removal as applied to a case, which the discussion supposes to be the same as described in both the statutes—a change with which it is not pretended that the plaintiff in error attempted to comply.

6. Our argument, therefore, runs thus. If, as we have heretofore shewn, the case as it was when the plaintiff in error attempted to remove it, was not described in and provided for by the Act of July 27, 1866, he failed in his attempt because he went upon that Act alone. If the case, on the contrary,

was described and provided for by that Act, then the later Act of 1867 changed the law as to the mode of removal by prescribing a very different thing to be done as the condition of removal. In either point of view the case was not removed, and this, we think, should be the end of the question.

7. If we were permitted to interpret the Act of 1867 for ourselves, we should take a broader view of it. It seems to us that in amending the Act of 1866, "as follows," it takes up the situation and subject referred to in that Act, and enumerates another code into which the former one is drawn and absorbed entirely. This, we believe, is in accordance with settled rules of interpetation. (See Osgood *v.* Chicago R. R. Co., 6 Bissel, 330; Murdoch *v.* City of Memphis, 20 Wallace, 590; 11 Wallace, 88; 13 How., U. S., 429; 12 Mass., 537; 10 Pick., 36; 7 Johns., 477, 497; 4 Cow., 556; 11 Wend. 329; 3 How. U. S., 636; 3 Alab., 626; 5 Hill (N. Y.), 321.

This is a view of the case which doubtless would suggest one or two critical points of construction of the Amending Act. For instance, must the controversy spoken of be one affecting only the plaintiff and defendant, citizens of different States? No doubt it must, for this is the most natural import of the language. Does the Act contemplate the existence of any controversy at all between other parties, or is that feature entirely eliminated from legislation by the Amendatory Statute? If not, does the removal spoken of remove "the suit" as to all parties, or only as between the citizens of different States? No doubt these points could be worked out, but they are not now involved.

We are in doubt whether this broader view of the Act of 1867 does not run counter to the decision of this Court, in the case of *The Sewing Machine*, 18 *Wall.*, 553, followed by *Vanevar* v. *Bryant*, 21 *Wall.*, 41, and therefore it is not pressed, yet it is true, that in both of those cases there was no possible severance of the controversy, because the liability was joint against all the defendants. Therefore the cases were not at all within the purview of the Act of 1866, and quite as plainly not provided for in the Amending Act of 1867.

For all present purposes we deem it sufficient to say, that no possible criticism can place in doubt the right of the plaintiff to remove the controversy in the State Courts of New York under the Act of 1867, if he had been able and willing to comply with the condition it imposes, and to say further, that it is inconceivable that the Legislature, in changing, by amendment, the former condition of removal, could leave the former condition in force, thus affording two methods of proceeding in precisely the same situation totally opposite to each other.

Fourth.

In concluding, we put aside the right of removal and its conditions as existing under one statute or the other, and say that the plaintiff failed to effectuate his right on the grounds now to be mentioned.

1. The Statute of 1866 requires that the defendant seeking a removal should "file his petition in the

State Court '*before the trial or final hearing*,' and offer good security," &c. The record in this case shows a petition verified by the plaintiff in error on the 10th of April, 1873, supported by affidavits made April 17 and June 4, 1873; also a bond dated April 16, 1873. *It does not appear when these papers were filed.*

2. The record (p. 2,) shows that the case was called on for a second trial against Yulee alone, June 9, 1873; that a jury was empaneled, and the case opened on the part of the plaintiff, and that *then*, and not before then, the counsel for Yulee moved to *dismiss the complaint* for want of jurisdiction, calling the attention of the Court to the petition, &c., on file. The Court simply denied that motion, and the case proceeded to a verdict and judgment.

3. *This was too late.* The petition must be filed and "good security" offered before the trial. It was not before the new trial, after the jury had been empanelled and the case opened by the plaintiff's counsel. It does not appear but that the petition was filed at the very instant before the motion to dismiss the complaint was made. It does not appear that the Court was asked to accept the security offered, or that it was offered at all, except as part of the motion. Nothing, so far as appears, was called to the attention of the Court until the trial had progressed. Now, all conditions precedent of the right of removal must be performed, and performed in time; and it cannot be maintained that the mere filing of a petition with the Clerk and the execution of a bond are a performance. The peti-

tion must be, and is, addressed to the State Court, and the security must be offered to, or at least brought to the notice of the Court. In short, the proceedings for removal must be judged of by the State Court in due time, and then, but not before, jurisdiction is lost if such proceedings are regular and sufficient. Therefore, the State Court had jurisdiction until the trial had begun, and after that it could not be lost.

4. The motion to "dismiss the complaint" was anomalous and wrong, and ought not to have been granted. To dismiss a complaint is to pronounce a judgment in favor of the defendant; but if, as claimed, the Court had no jurisdiction, it was because the complaint and all the proceedings were transferred to another Court; therefore, the State Court could not dismiss it or render any judgment whatever.

The judgment of the New York Court of Appeals should be affirmed.

THERON G. STRONG,
GEO F. COMSTOCK,
For Defendant in Error.

Act of September 24, 1789,

First Congress, Session I, Ch. 20, 1 Stat. at L. 73, Removal of Causes.

Sec. 12. If a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court; and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending (or if in the district of Maine to the district Court next to be holden therein, or if in Kentucky district to the district Court next to be holden therein), and offer good and sufficient surety for his entering in such Court on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein; it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such Court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in

the same manner as by the laws of such State, they would have been holden to answer final judgment, had it been rendered by the Court in which the suit commenced. And if, in an action commenced in a State Court, the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the Court, either party, before the trial, shall state to the Court, and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a State other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the Court, whether he claims a right or title to the land under a grant from the State in which the suit is pending; and such adverse (party) shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next Circuit Court, to be holden in such district (or if in the district of Maine, to the Court next to be holden therein; and if in Kentucky district, to the district Court next to be holden therein); but, if he is the defendant, shall do it under the same regulations as in the before-mentioned case, of the removal of a cause into such Court by an alien; and neither party removing the cause shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the Circuit Courts shall, in all suits, except those of equity, and of admiralty, and of maritime jurisdiction, be by jury.

Act of July 27, 1866.

THIRTY-NINTH CONGRESS, SESSION I, CH. 288, 14 STAT., AT L., 306.

An Act for the removal of causes in certain cases from State Courts.

Removal by alien or non-resident defendant. If, in any suit already commenced, or that may hereafter be commenced, in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates to the alien defendant or to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted, for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him and of all pleadings, depositions, testimony and other proceedings in said cause affecting or concerning him, and also for his there appearing and entering special bail in the cause, if special

bail was originally requisite therein; and it shall thereupon be the duty of the State Court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal; and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid in such Court of the United States, the cause shall then proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment, in the same manner as by the laws of such State they would have been holden to answer final judgment had it been rendered by the Court in which the suit commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States Court into which the same shall be removed; and any bond of indemnity or other obligation given by the plaintiff upon the issuing or granting of any attachment, writ of injunction or other restraining process against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for his indemnity in case of attachment, injunction, or other restraining process, be set aside or dissolved, or judgment be rendered in his favor, in the same manner and with the same force and effect as if such injunction, attachment, or restraining process had been granted, and such bond had been originally filed or given in the Court to which the cause is removed. And such removal of the cause, as against the defendant petitioning therefor into the United States Court, shall not be

deemed to prejudice or take the right of the plaintiff to proceed at the same time with the suit in the State Court as against the other defendants if he shall desire to do so. And the copies of all pleadings filed or entered as aforesaid in the United States Court by the defendant applying for the removal of the cause, shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the law and practice of the Courts of such State if the cause had remained in the State Court.

Act of March 2, 1867.

THIRTY-NINTH CONGRESS, SESSION II., CH. 196, 14 STAT. AT L., 558.

An Act to amend an Act entitled "An Act for the Removal of Causes in certain cases from State Courts," approved July 27, 1866.

Removal allowed where a fair trial cannot be had. That the Act entitled "An Act for the Removal of Causes in certain cases from State Courts," approved July 27, 1866, be, and the same is hereby amended as follows:

That where suit is now pending, or may hereafter be brought in any State Court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State Court an affidavit, stating that he has reason to and does

believe that, from prejudice or local influence, he will not be able to obtain justice in such State Court, may, at any time before the final hearing or trial of the suit, file a petition in such State Court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and doing such other appropriate acts, as by the Act to which this act is amendatory, are required to be done upon the removal of a suit into the United States Court; and it shall be, thereupon, the duty of the State Court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such Court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process; and all the provisions of the Act to which this Act is amendatory, respecting any bail, attachment, injunction or other restraining process, and respecting any bond of indemnity, or other obligation, given upon the issuing or granting of any attachment, injunction or other restraining process, shall apply with like force and effect, in all respects to similar matters, process or things in the suits for the removal of which this act provides.